(1) No. 00-860-CFX Title: Correctional Services Corporation, Petitioner
v.
John E. Malesko

Docketed: November 29, 2000 Court: United States Court of Appeals for the Second Circuit

Entry	Date	Proceedings and Orders
	Nov 22 2000	Petition for writ of certiorari filed. (Response due December 29, 2000)
	Dec 13 2000	Waiver of right of respondent John E. Malseko to respond filed.
	Dec 20 2000	DISTRIBUTED for Conference of January 5, 2001
	Jan 2 2001	Response requested.
	Feb 5 2001	Brief of respondent John E. Malseko in opposition filed.
	Feb 5 2001	Motion of respondent for leave to proceed in forma pauperis filed.
	Feb 14 2001	REDISTRIBUTED for Conference of March 2, 2001
	Feb 20 2001	Reply brief of petitioner Correctional Services Corporation filed.
	Mar 5 2001	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Mar 5 2001	Petition GRANTED. SET FOR ARGUMENT October 1, 2001. **********
	Mar 30 2001	Order extending time to file the joint appendix and petitioner's brief on the merits to and including May 7, 2001.
	Apr 25 2001	Order further extending time to file the joint appendix and petitioner's brief on the merits to and including May 17, 2001.
	May 17 2001	Joint appendix filed.
	May 17 2001	Brief of petitioner Correctional Services Corporation filed.
	May 17 2001	Brief amicus curiae of United States filed.
	Jun 15 2001	Order extending time to file respondent's brief on the merits to and including July 20, 2001.
	Jun 15 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jun 29 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Jul 20 2001	Brief of respondent John E. Malesko filed.
	Jul 20 2001	Brief amicus curiae of Legal Aid Society of the City of New York filed.
	Jul 20 2001	Brief amicus curiae of American Civil Liberties Union filed.
	Jul 25 2001	CIRCULATED.
	Sep 4 2001	Record filed.
	Sep 4 2001	Record filed.
	Sep 4 2001	Reply brief of petitioner Correctional Services Corporation filed.
	Oct 1 2001	ARGUED.

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IN THE

Supreme Court of the United States

CORRECTIONAL SERVICES CORPORATION,
Petitioner,

v.

JOHN E. MALESKO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a cause of action for damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be implied against a private corporation acting under color of federal law.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, the Petitioner states that it formerly was known as Esmor Correctional Services, Inc. The other parties in the proceedings below were Jorge Urena[1] and "'John Does #2 to John Does #10,' Inclusive, The Names Of Said John Doe Defendants Are Presently Unknown But Intended To Indicate Managers And Guards Of The Corporate Defendant."

Pursuant to Supreme Court Rule 29.6, Petitioner states that there are no parent companies, subsidiaries and/or affiliates of Correctional Services Corp. that have issued shares to the public.

[1] In the plaintiff's amended complaint, Jorge Urena was substituted as "John Doe Defendant #1." Although the caption to the district court's Memorandum Opinion and Order of July 28, 1999 (Pet. App. 19a) bears this substitution, the caption in the court of appeals opinion (Pet. App. 1a) does not.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Correctional Services Corp. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals was entered on October 6, 2000, is reported at 229 F.3d 374 (2d Cir. 2000), and is reprinted in the Appendix to this Petition ("Pet. App.") at 1a-18a. The memorandum opinion and order of the United States District Court for the Southern District of New York was entered on July 28, 1999, is unreported, and is reprinted in Pet. App. at 19a-24a.

JURISDICTION

The court of appeals entered its decision on October 6, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

No constitutional or statutory provisions are involved in this petition. Instead, this case involves the permissibility of extending the constitutionally-inferred cause of action recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to the circumstances of this case.

STATEMENT OF THE CASE

The important question raised by the decision below is whether this Court's decision in *FDIC* v. *Meyer*, 510 U.S. 471 (1994), precludes the extension of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to create an implied cause of action for damages against a private corporation engaging in federal action by operating a correctional institution on behalf of the Federal Bureau of Prisons. This case implicates a clear and acknowledged split among the courts of appeals on the far-reaching fundamental question of whether private corporations acting under color of federal law are subject to *Bivens* claims.

A. This Court's Leading Cases: *Bivens* And *Meyer*

The interpretation of two critical decisions by this Court animates the correct analysis of the question posed in this case: *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and *FDIC* v. *Meyer*, 510 U.S. 471 (1994). In *Bivens*, in the absence of any statutory basis for suit, this Court inferred a cause of action for private damages against Federal Bureau of Narcotics officers directly from the constitutional provision that they were alleged to have violated under color of federal law. In so doing, however, this Court cautioned that "[t]he present case involves no special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396.

More recently, this Court unanimously refused to extend *Bivens* to imply a similar cause of action directly against an agency of the federal government, as opposed to against federal officers themselves. See *Meyer*, 510 U.S. at 473. The Court recalled that it has "'responded cautiously to suggestions that *Bivens* remedies be extended into new contexts.'" *Id.* at 484 (quoting *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988)). By seeking "to expand the category of defendants against whom *Bivens*-type actions may be brought to include not only federal *agents*, but federal *agencies* as well," the plaintiff in *Meyer* was seeking "a significant extension of *Bivens*," that was properly viewed with skepticism. *Id.*

In *Meyer*, this Court unanimously rejected the contention that the "'logic'" of *Bivens* would support implying "a *Bivens*-type cause of action directly against a federal agency." *Id.* To the contrary, given that the plaintiff in *Bivens* sued the federal *agents* of the Federal Bureau of Narcotics who allegedly violated his rights, "the logic of *Bivens* supports—a *Bivens* claim for damages against . . . the [agency] employee" wrongdoer, not against the agency itself. *Id.* at 485. Significantly, the *Meyer* Court was not persuaded that the logic of *Bivens* permits an entity, as opposed to an individual, to be subject to a *Bivens* suit even when that entity lacks sovereign immunity. See *id.* at 483 (holding that the FSLIC is not subject to a *Bivens* action even though its "sue-and-be-sued clause waives the agency's sovereign immunity for [plaintiff's] constitutional tort claim"); *id.* at 485 ("In essence, [plaintiff] asks us to imply a damages action based on a decision [*Bivens*] that presumed the *absence* of that very action.") (citing *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in judgment)).

The *Meyer* decision suggested two other reasons not to extend *Bivens* to actions against federal agencies. First, implying a direct damages cause of action would undermine the deterrence rationale underlying *Bivens*: "[T]he purpose of *Bivens* is to deter *the officer*." *Id.* "If we were to imply a

damages action directly against federal agencies, thereby permitting claimants to bypass qualified immunity, there would be no reason for aggrieved parties to bring damages actions against individual officers. . . . [and] the deterrent effects of the *Bivens* remedy would be lost." *Id.* Second, one of the "'special factors counseling hesitation'" specifically enumerated in *Bivens*, namely, "creating a potentially enormous financial burden for the Federal Government," would be implicated by extending a *Bivens* cause of action against federal agencies. *Id.* at 486 (quoting *Bivens*, 403 U.S. at 396). Accordingly, the *Meyer* opinion rejected expansion of this judge-made cause of action and instead left "it to Congress to weigh the implications of such a significant expansion of Government liability." *Id.*

This case now raises the question of whether the logic of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, as refocused in *FDIC* v. *Meyer*, supports extending *Bivens* to create a cause of action against a private corporation acting under color of federal law.

B. Factual Background

Petitioner Correctional Services Corp. ("CSC"), a private corporation, operates the Le Marquis Community Corrections Center ("Le Marquis"), a halfway house located in New York, on behalf of the Bureau of Prisons ("BOP"). While in the custody and care of the BOP, John E. Malesko, the plaintiff in the underlying lawsuit here, was transferred to Le Marquis, where the events underlying this litigation transpired. At Le Marquis, Malesko was assigned to a fifth floor bedroom. CSC has a policy prohibiting inmates assigned to lower floors from using the elevator, but because Malesko had been diagnosed with a heart condition, CSC permitted Malesko to use the elevator. On or about March 28, 1994, however, Jorge Urena, a CSC employee, allegedly refused to permit Malesko to use the elevator and forced him to use the stairs. Upon ascending the stairs, Malesko allegedly suffered a heart attack, fell, and injured his ear.

Malesko also alleges that, during this time, CSC employees failed to replenish medication prescribed to treat his heart condition. See Pet. App. 2a-3a, 19a-20a.

As a result of the foregoing events, on March 27, 1997, Malesko filed a *pro se* complaint in the United States District Court for the Southern District of New York against CSC and certain "John Doe" CSC employees seeking $4,000,000 in damages. On February 2, 1999, Malesko filed an amended complaint substituting Jorge Urena for "John Doe Defendant #1." CSC moved to dismiss on February 10, 1999.

The district court treated Malesko's amended complaint as raising a *Bivens* claim. On July 28, 1999, the district court granted CSC's motion to dismiss the amended complaint as to CSC "on two independent grounds: first, that Plaintiff cannot bring a *Bivens* action against a corporation; and, second, that CSC is immune to suit because it is a government contractor." Pet. App. 20a. Citing *Meyer*, 510 U.S. at 483-87, the district court reasoned that "[a] *Bivens* action may only be maintained against an individual," Pet. App. 20a, and thus, was not available against CSC, a corporation.[1]

C. Decision Of The Court Of Appeals

The United States Court of Appeals for the Second Circuit reversed the district court's dismissal of the *Bivens* claim against CSC. The court of appeals concluded that the district

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[1] On March 17, 1999, Malesko cross-moved seeking to file a second amended complaint to name additional CSC employees as "Doe" defendants. Pet. App. 20a. The district court denied this motion as time-barred and thus, futile under Rule 15 of the Federal Rules of Civil Procedure. *Id.* at 21a-24a. The district court also made a similar ruling with respect to Urena, the remaining individual defendant. *Id.* at 24a. The Second Circuit affirmed these rulings. *Id.* at 18a. As a result, CSC is the only defendant remaining in the case. Accordingly, this case does not present the question of whether private individuals are liable under *Bivens*, even though they are employed by a private firm.

court erred in interpreting *Meyer* to preclude *Bivens* actions against private corporations.

The Second Circuit began by observing that "[a]lthough the issue is new in this Circuit, several circuit courts recognized prior to the *Meyer* decision that *Bivens*-type claims could be asserted against private corporations so long as the corporations engaged in 'federal action,' *i.e.*, they acted under color of federal law" and that "[d]uring this pre-*Meyer* time period, no circuit court ever held that private entities were not subject to *Bivens*." Pet. App. 5a-6a (citations omitted). Accordingly, the court reasoned that it was "not persuaded that the Supreme Court implicitly overruled this long line of cases in the *Meyer* opinion without making reference to any of them" and found, therefore, that "*Meyer* does not control our analysis of whether *Bivens* claims may be brought against private corporations." *Id.* at 12a.

The Second Circuit next observed that "[a]lthough *Meyer* addressed only whether *Bivens* claims could be brought against federal agencies and thus, on its face, did not appear to implicate the question of whether a private corporation could be sued under *Bivens*, other circuits have subsequently reached differing conclusions regarding its impact on such claims." Pet. App. 7a. Specifically, the court of appeals acknowledged that the D.C. Circuit and the Sixth Circuit have reached opposite results. Compare *Kauffman* v. *Anglo-American Sch. of Sofia*, 28 F.3d 1223, 1224 (D.C. Cir. 1994), with *Hammons* v. *Norfolk S. Corp.*, 156 F.3d 701 (6th Cir. 1998). In particular, the D.C. Circuit held, in light of *Meyer*, that a private entity that is "not a federal agency, but that is constrained by the Constitution in some or all of its acts solely because of *lesser* links to the federal government, is equally exempt from *Bivens* liability." *Kauffman*, 28 F.3d at 1224. In stark contrast, the Sixth Circuit held that "[n]othing in *Meyer* prohibits a *Bivens* claim against a private corporation that engages in federal action." *Hammons*, 156 F.3d at 705. After reviewing the circuit split, the panel followed the

Sixth Circuit's approach. See Pet. App. 10a ("We find the Sixth Circuit's analysis in *Hammons* persuasive and, substantially for the reasons articulated by that court, we hold that a private corporation acting under color of federal law may be sued under *Bivens*").

Like the Sixth Circuit, the Second Circuit held that *Meyer* was not dispositive "because private entities acting on behalf of the federal government are not the equivalent of federal agencies." Pet. App. 10a (suggesting private corporation was "akin to an agent of the government and not a federal agency").

The panel also found that the reasons presented in *Meyer* for not extending *Bivens* to claims against federal agencies were "not compelling" in the context of extending *Bivens* claims to private corporations. Pet. App. 10a. First, the Second Circuit looked beyond *Meyer*'s emphasis on deterrence, stating "we find an extension of such liability to be warranted even absent a substantial deterrent effect in order to accomplish the more important *Bivens* goal of providing a remedy for constitutional violations." *Id.* (citing *Bivens*, 403 U.S. at 407-08 (Harlan, J., concurring)). To the extent deterrence was important, the court of appeals posited that it would not be undermined by extending liability to private entities because "an employer facing exposure to such liability would be motivated to prevent unlawful acts by its employees." *Id.* at 11a. Second, the Second Circuit reasoned that "although a private entity contracting to carry out governmental functions might pass on the costs of *Bivens* liability to the government, we do not believe such liability has the type of direct impact on federal fiscal policy" that raised concern in *Meyer* about extending *Bivens* claims to federal agencies. *Id.*[2]

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[2] Looking to what it termed the "analogous" 42 U.S.C. § 1983 context, the panel was "influenced strongly" by this Court's holding "that private corporations engaging in state action may be sued under § 1983. . . . We see no reason not to incorporate that law into the *Bivens* context and

REASONS FOR GRANTING THE PETITION

This case presents an important, recurring, and intolerable conflict of federal law regarding whether this Court's decision in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be extended to create an implied cause of action for damages against private corporations acting under color of federal law. Since this Court's decision in *Meyer*, at least three courts of appeals have issued conflicting decisions on this question of far-reaching doctrinal and practical importance. Compare *Kauffman* v. *Anglo-American Sch. of Sofia*, 28 F.3d 1223, 1224, 1226-1228 (D.C. Cir. 1994), with Pet. App. 5a-12a, and *Hammons* v. *Norfolk S. Corp.*, 156 F.3d 701, 704-08 (6th Cir. 1998). See also *Heinrich ex rel. Heinrich* v. *Sweet*, 62 F. Supp. 2d 282, 307-08 (D. Mass. 1999) (following *Hammons*). A clear and irreconcilable conflict thus currently exists among the courts of appeals and further review by this Court plainly is warranted to provide uniformity on a fundamental issue involving the scope of *Bivens*. Finally, the Second Circuit was wrong to permit a plaintiff to sue a private corporation for damages under *Bivens* and certiorari should be granted to correct this error.

I. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS ABOUT WHETHER EXTENDING *BIVENS* TO CREATE A CAUSE OF ACTION AGAINST PRIVATE CORPORATIONS OPERATING UNDER COLOR OF FEDERAL LAW IS WARRANTED AFTER *MEYER*.

On the issue of whether *Bivens* actions should be extended to claims against private entities in light of this Court's ruling

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permit suits against private corporations engaging in federal action." Pet. App. 12a (citing *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982)). The Second Circuit therefore held that "a private corporation acting under color of federal law may be subject to liability under *Bivens*." *Id.*

in *Meyer*, the Second Circuit chose to follow the Sixth Circuit in *Hammons*. The court of appeals therefore held that a private corporation acting under color of federal law may be subject to liability under *Bivens* despite this Court's decision in *Meyer* precluding a *Bivens* action against a federal agency that had waived sovereign immunity. As acknowledged by the court of appeals below, its decision is squarely in opposition to the D.C. Circuit's holding in *Kauffman* that *Meyer* forecloses a *Bivens* action against a private entity. In these cases, the courts of appeals have sharply disagreed about the applicability of each aspect of the *Meyer* analysis to private entities operating under color of federal law.

Most fundamentally, the courts of appeals have disagreed about whether *Meyer*—a case in which the Court unanimously refused to extend *Bivens* to create a cause of action against a federal agency whose sovereign immunity had been waived—even controls the question of whether *Bivens* may be expanded to create a cause of action against a private entity acting under color of federal law. The D.C. Circuit held that *Meyer* "is controll[ing]" and barred a *Bivens* action against a private entity.[3] *Kauffman*, 28 F.3d at 1224. In contrast, the Second Circuit held that "*Meyer* does not control

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[3] The entity involved was the Anglo-American School of Sofia, chartered as "'a private and independent organisation [sic]'" and allegedly set up at the initiative of and funded in part by State Department, but not as a subsidiary of government. *Kauffman* v. *Anglo-American Sch. of Sofia*, 28 F.3d 1223, 1224 (D.C. Cir. 1994). The Second Circuit asserted that the *Kauffman* decision resulted, in part, "from the fact that the entity at issue was arguably a federal government agency." Pet. App. 11a n.3. While the *Kauffman* decision does not warrant the Second Circuit's gloss, in case there is any question as to its intentions, the D.C. Circuit has further applied *Kauffman* to dismiss a *Bivens* claim against a private entity, the American Correctional Association ("ACA"), that has even fewer ties to government. *See Bailey* v. *Illinois Freedom Militia S. Zone*, No. 98-5094, 1998 WL 545425, at *1 (D.C. Cir. July 17, 1998) (noting also, as a second ground for dismissal, "[m]oreover, because ACA is not a federal actor . . . appellant's *Bivens* action cannot stand").

our analysis of whether *Bivens* claims may be brought against private corporations" and would permit a *Bivens* claim against Petitioner, a private corporation. Pet. App. 12a. Likewise, the Sixth Circuit held that "*Meyer* is not dispositive" as to whether a private corporation is amenable to a *Bivens* suit. *Hammons*, 156 F.3d at 705 (assuming that defendant engaged in sufficient state action, "[n]othing in *Meyer* prohibits a *Bivens* claim against a private corporation that engages in federal action"); see also *Heinrich*, 62 F. Supp. 2d at 308 (holding that "the Supreme Court's reasoning in *Meyer* is inapplicable to the case of private entity defendants").

More particularly, the courts of appeals have disagreed sharply about whether the specific rationales articulated in *Meyer* to preclude *Bivens* liability against a federal agency that lacked sovereign immunity applies to private corporations acting under color of federal law. *First*, this Court's unanimous decision in *Meyer* emphasized that "the purpose of *Bivens* is to deter *the officer*" from engaging in unconstitutional conduct. *FDIC* v. *Meyer*, 510 U.S. 471, 485 (1994). Accordingly, even where sovereign immunity is waived, and thus does not bar suit against the wrongdoing federal agent's employer, "[i]f we were to imply a damages action directly against federal agencies, thereby permitting claimants to bypass qualified immunity [of federal officers], there would be no reason for aggrieved parties to bring damages actions against individual officers. . . . [and] the deterrent effects of the *Bivens* remedy would be lost." *Id.*; see *Kauffman*, 28 F.3d at 1227 ("*Meyer* argued that if given a choice, plaintiffs would have every reason to sue a federal agency instead of its individual officials, because this tactic would circumvent the qualified-immunity defenses that the individuals might be expected to raise."). There is sharp disagreement among the courts of appeals about whether *Bivens* even warrants the *Meyer* Court's unanimous emphasis on deterring individual officers from engaging in unconstitutional conduct[4] and about how properly to analogize deterrence concerns in the context of a private entity *Bivens* defendant.

The Sixth Circuit read the deterrence rationale of *Meyer* narrowly and analogized private entities to federal officers, rather than analogizing private entities to public entities: "the concern the Court had regarding qualified immunity and its effect on deterring individual officers is not a concern in the context of private corporations inasmuch as private corporations are not public officials[] and thus, not entitled to qualified immunity." *Hammons*, 156 F.3d at 706 n.9. The D.C. Circuit, by contrast, read the deterrence concerns articulated in *Meyer* more broadly and found them applicable even where the entity is a private, and not a federal, entity. In particular, the D.C. Circuit explained that "the premise of *Meyer* is that individual agents are not deterred by the threat of suit against their employers. . . . [Accordingly,] there would seem to be no affirmative reason to allow *Bivens* actions against entities of any sort, private or public." *Kauffman*, 28 F.3d at 1227. The court further reasoned that,

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[4] Despite acknowledging *Meyer*'s emphasis on deterrence, both the Second and Sixth Circuits suggest that the true purpose of *Bivens* is not deterring unconstitutional conduct, but remedying unconstitutional conduct irrespective of deterrence. Pet. App. 10a ("[W]e find an extension of such liability to be warranted even absent a substantial deterrent effect in order to accomplish the more important *Bivens* goal of providing a remedy for constitutional violations.") (citing *Bivens*, 403 U.S. at 407-08 (Harlan, J., concurring)); *Hammons*, 156 F.3d at 705, 706 & n.10 ("While the Court in *Meyer* focussed on the deterrence goal, this clearly is not the only goal underlying a *Bivens* claim"; suggesting that *Bivens* really "seemed to focus . . . on the history of the federal courts and their role protecting rights under the Constitution"; citing to Justice Harlan's concurrence in *Bivens* to assert that "while recognizing the importance of deterring the individual wrongdoer, [we] believe that the importance of remedying constitutional violations far exceeds any deterrence goal—victims are entitled to relief regardless of whether future lawless conduct is deterred"; "[a]lthough deterrence is an important policy consideration, victims of lawless conduct should be remedied regardless of whether future constitutional violations are deterred.").

"on *Meyer*'s logic, provision of a damages remedy against a private entity would actively diminish the deterrent value of the remedy against the individual." *Id.* "If such additional defendants were available (often with deeper pockets than the individual offenders), plaintiffs might make the same choice as [plaintiffs here], who brought their *Bivens* action *only* against the private entity and not against the individual [wrongdoers]." *Id.* Linking this argument to the overall deterrence concern described in *Meyer*, the D.C. Circuit concluded that "[t]o the extent that plaintiffs make such choices with any regularity, *Meyer* indicates that the deterrent effect of the *Bivens* remedy would be weakened." *Id.* (noting "[i]n sum, on *Meyer*'s deterrence rationale, there is no affirmative reason to recognize *Bivens* actions against private entities, and there is some reason *not* to do so"). The Second Circuit, by contrast, posited that *Meyer*'s concern about deterring the individual wrongdoer would not be undermined by extending liability to private entities because "an employer facing exposure to such liability would be motivated to prevent unlawful acts by its employees." Pet. App. 11a. Accordingly, there is a sharp dispute about the proper interpretation and application of the deterrence rationale of *Bivens* and *Meyer* in the private entity context.

Second, there also is clear disagreement about whether one of the "'special factors counseling hesitation'"—namely, "creating a potentially enormous financial burden for the Federal Government"—specifically enumerated in *Bivens*, and applied in *Meyer*, is implicated by extending a *Bivens* cause of action against private corporations. *Meyer*, 510 U.S. at 486 (quoting *Bivens*, 403 U.S. at 396). Based in part on this concern, the *Meyer* Court rejected expansion of *Bivens* against federal agencies and left "it to Congress to weigh the implications of such a significant expansion of Government liability." *Id.*

The D.C. Circuit found this argument relevant to the private corporation case because "diversion of resources from a

private entity created to advance federal interests has effects similar to those of diversion of resources directly from the Treasury." *Kauffman*, 28 F.3d at 1227-28. It further reasoned that if funds were diverted from the private entity's coffers to liability payments, "the government presumably w[ould] have to choose between allowing its interest to be served less well and spending more money to make up the shortfall—precisely the same choice that it would confront if *Bivens* actions could be brought against federal agencies." *Id.* at 1227. By contrast, the Sixth Circuit concluded that *Meyer*'s concern about the "potentially enormous financial burden on the Government" in extending *Bivens* liability to federal agencies "is not applicable to the case at hand" because "[a]llowing a *Bivens* claim against a private corporation does not implicate 'federal fiscal policy,' where, as here, the federal purse is not involved." *Hammons*, 156 F.3d at 706. Similarly, the Second Circuit observed that:

> although a private entity contracting to carry out governmental functions might pass on the costs of *Bivens* liability to the government, we do not believe such liability has the type of direct impact on federal fiscal policy that the Supreme Court in *Meyer* was concerned would result from imposing *Bivens* liability directly upon federal agencies.

Pet. App. 11a.

But, as the D.C. Circuit recognized, there is more at stake than just direct impacts on the federal fisc. Even beyond *Meyer*'s discussion of Congress's institutional superiority to create remedies implicating federal fiscal policy, the D.C. Circuit noted that "[m]ore generally, *Meyer* expressed considerable reluctance to extend *Bivens* remedies beyond the sort of situation involved in *Bivens* itself." *Kauffman*, 28 F.3d at 1228 (recalling *Meyer*'s emphasis on exercising caution in expanding *Bivens* remedies to new contexts). Accordingly, despite some pre-*Meyer* decisions that seemed to assume the availability of *Bivens* actions against private corporations,

"we think the present case presents such a 'new context[].'" *Id.* (omission in original) (quoting *Meyer*, 510 U.S. at 484).[5]

Accordingly, there is a well-developed, clear, and irreconcilable conflict among the courts of appeals about whether, in light of *Meyer*, a *Bivens* action may be created against private corporations acting under color of federal law.

II. THE QUESTION OF WHETHER *BIVENS* APPLIES TO PRIVATE CORPORATIONS ACTING UNDER COLOR OF FEDERAL LAW IS RECURRING AND IMPORTANT.

The conflict created by the courts of appeals presents an important issue that recurs in a variety of contexts. For example, in the cases which form and discuss the circuit split at issue, private entities have been sued under color of federal law in the context of corrections (*Malesko*), education (*Kauffman*, *Heinrich*), railroads (*Hammons*), and hospitals (*Heinrich*). Thus, the current circuit split has far-reaching implications for whether private entities acting under color of federal law are amenable to suit under *Bivens*.

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[5] There also is a clear division of opinion about the impact of those pre-*Meyer* court of appeals decisions that seemed to assume the availability of a *Bivens* cause of action against a private corporation. The Second Circuit observed that "[d]uring this pre-*Meyer* time period, no circuit court ever held that private entities were not subject to *Bivens*" and was "not persuaded that the Supreme Court implicitly overruled this long line of cases in the *Meyer* opinion without making reference to any of them." Pet. App. 6a, 12a (citing and purporting to follow pre-*Meyer* cases); *see also Hammons* v. *Norfolk S. Corp.*, 156 F.3d 701, 708 (6th Cir. 1998) (citing and "join[ing]" pre-*Meyer* cases); *Heinrich ex rel. Heinrich* v. *Sweet*, 62 F. Supp. 2d 282, 308 (D. Mass. 1999) (following *Hammons* and pre-*Meyer* circuit precedent "that appears to allow the use of *Bivens* against private entities"). By contrast, the D.C. Circuit held that the pre-*Meyer* cases assuming *Bivens* causes of action against private corporations "do[] not survive *Meyer*." *Kauffman*, 28 F.3d at 1226, 1228 & n.3 (citing cases).

In particular, in the corrections area alone, there has been a marked increase in the privatization of federal correctional institutions in recent years. In the last ten years, the number of prisoners being housed in private facilities nationwide has jumped from 15,476 to 141,361. See Charles W. Thomas, *Private Adult Correctional Facility Census*, Figure 1, *at* http://www.crim.ufl.edu/pcp/census/2000 (Oct. 13, 2000). In 1997, the BOP reported that 10 percent (9,951 of 98,631) of its total population of sentenced prisoners were held in privately-operated facilities. See Douglas McDonald et al., Abt Assoc. Inc., *Private Prisons in the United States: An Assessment of Current Practice* 12 (1998). Moreover, Congress recently "mandated that 50 percent of the District of Columbia inmates . . . be placed in private facilities by 2003." Kathleen Hawk Sawyer, *Message to All Bureau of Prisons Employees Regarding Privatization*, *at* http://www.bop.gov/ccdpg/ccdpriv.html (July 1999). The impact of this question extends even beyond the BOP, given that the U.S. Marshals Service and the U.S. Immigration and Naturalization Service also have contracted with private correctional facilities. Accordingly, whether a federal prisoner may bring a *Bivens* action against a private corporation acting under color of federal law has important and far-reaching implications.

Moreover, the current split of authority among the federal courts of appeals as to whether *Bivens* implies a cause of action against private corporations acting under color of federal law leads to several anomalous results in the corrections arena alone. For example, whether a federal prisoner housed in a private correctional facility is permitted to bring a *Bivens* action against that entity currently depends on the happenstance of geography. In the Second and Sixth Circuits (as well as in the District of Massachusetts)—under *Malesko* and under the logic of *Hammons* and *Heinrich*—a federal prisoner may bring a *Bivens* cause of action against a private correctional entity acting under color of federal law. By contrast, in the D.C. Circuit, under the logic of *Kauffman*,

they may not. This problem is exacerbated by the fact that the BOP exercises plenary authority over prison transfers. Accordingly, prisoners may find their *Bivens* rights radically transformed as they are transferred between facilities located in federal jurisdictions with different controlling precedent.

Furthermore, whether a federal prisoner in the Second and Sixth Circuits (or in the District of Massachusetts) may bring a *Bivens* action against the correctional entity to which that prisoner is assigned, depends upon the happenstance of that entity being a public or private facility. Within these federal jurisdictions (at least), the BOP (or another analogous federal agency) and the public prisons it runs would not be subject to *Bivens* actions while private correctional facilities in those same jurisdictions would be subject to *Bivens* actions. Compare, *e.g.*, Pet. App. 12a (permitting a *Bivens* action against Petitioner CSC, a private corporation operating a correctional facility in New York on behalf of the BOP, despite *Meyer*), with *Tejeda* v. *Reno*, No. 00-CIV-6338 SAS, 2000 WL 1280969, at *3 (S.D.N.Y. Sept. 11, 2000) (following *Meyer* and prohibiting a *Bivens* action against the BOP and a federal penitentiary), and *Newman* v. *Holder*, 101 F. Supp. 2d 103, 107 (E.D.N.Y. 2000) (holding that the BOP "as an agency of the United States, is not a proper defendant in a *Bivens*-type action"). This Court should grant certiorari to correct these anomalous results and to answer once and for all whether private entities acting under color of federal law are subject to *Bivens* actions.

III. THE SECOND CIRCUIT ERRED IN EXTENDING *BIVENS* TO CREATE A PRIVATE CAUSE OF ACTION AGAINST A PRIVATE CORPORATION OPERATING UNDER COLOR OF FEDERAL LAW.

In *Meyer*, this Court unanimously rejected the contention that the "'logic'" of *Bivens* would support implying "a *Bivens*-type cause of action directly against a federal agency," even when that agency enjoyed no sovereign immunity from

suit. *Meyer*, 510 U.S. at 484. To the contrary, given that the plaintiff in *Bivens* sued the federal *agents* of the Federal Bureau of Narcotics who allegedly violated his rights, "the logic of *Bivens* supports—a *Bivens* claim for damages against . . . the [agency] employee" wrongdoer, not against the agency itself. *Id.* at 485. Likewise here, the district court below was correct in holding that a *Bivens* action only may be maintained against an individual and thus, was not available against CSC, a corporation.

In summarizing its argument, the D.C. Circuit in *Kauffman* usefully recalls that the very foundation of a *Bivens* claim presupposes that the defendant is acting sufficiently *like* government to be considered acting under color of federal law. See *Kauffman*, 28 F.3d at 1226 (observing that plaintiffs "enjoy a constitutional claim only to the extent that the [private actor's decision] can be analogized to the decision of a federal agency"). Accordingly, the panel concluded, "[w]e think it untenable to draw this analogy for purposes of *Bivens* but not for purposes of *Meyer*." *Id.* If a federal agency that has waived sovereign immunity is not subject to suit under *Bivens*, then neither is a private corporation acting like a federal agency. The proper *Bivens* defendant is an individual wrongdoer, not an entity, be it public or private.

For all of the reasons outlined above, this Court should grant the petition to correct the Second Circuit's error in extending *Bivens* liability to private corporations, to answer this important and recurring question of federal law, and to end the irreconcilable conflict among the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 22, 2000

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT.

No. 99-7995.

JOHN E. MALESKO,
Plaintiff-Appellant,

v.

CORRECTIONAL SERVICES CORPORATION, formerly known as ESMOR CORRECTIONAL SERVICES INC. AND "JOHN DOES # 1 TO JOHN DOES # 10," inclusive, the names of said John Doe Defendants are presently unknown but intended to indicate officers and managers and guards of the corporate defendant,
Defendants-Appellees.

Argued: April 19, 2000
Decided: Oct. 06, 2000

Before: POOLER and SOTOMAYOR, Circuit Judges.*

Affirmed in part; vacated and remanded in part.

SOTOMAYOR, Circuit Judge:

Plaintiff-appellant John E. Malesko appeals from the July 28, 1999 judgment of the United States District Court for the

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* The Honorable Ellsworth A. Van Graafeiland was originally assigned as a member of the panel but, due to illness, did not attend oral argument or participate in the disposition of this appeal. The appeal is being determined by the remaining members of the panel, who are in agreement. *See* 2d Cir. R. § 0.14(b); *Murray v. National Broad. Co.*, 35 F.3d 45, 46 (2d Cir.1994).

Southern District of New York (Martin, Judge) dismissing his complaint against defendant-appellee Correctional Services Corporation ("CSC") and a specifically named CSC employee, and denying him leave to file a second amended complaint. For the reasons that follow, we vacate the district court's dismissal of the claims against CSC. We affirm, however, the district court's dismissal of Malesko's claim against the individual CSC employee as time-barred and the denial of leave to file the second amended complaint on the same ground.

BACKGROUND

On December 3, 1992, following his conviction for federal securities fraud, Malesko was sentenced to eighteen months imprisonment under the supervision of the Federal Bureau of Prisons ("BOP"). While in the custody and care of BOP, Malesko was diagnosed with a heart condition, which was treated with prescription medication. On February 2, 1994, Malesko was transferred to Le Marquis Community Corrections Center, a halfway house where he was to serve out the balance of his sentence. The halfway house is operated on behalf of BOP by CSC, a private corporation.

Malesko was assigned to living quarters on the fifth floor of the halfway house and was permitted to use the elevator to travel from the lobby to his room. On or about March 1, 1994, however, CSC allegedly instituted a policy requiring inmates residing below the sixth floor to use only the staircase to travel from the first-floor lobby to their rooms. Despite CSC's policy, Malesko claims that he was permitted to use the elevator because CSC staff knew of his medical condition. According to Malesko, however, on March 28, 1994, a CSC employee prevented him from using the elevator to go from the lobby to his room on the fifth floor. The employee instead directed Malesko to climb the staircase, even though Malesko reminded the employee of his heart

condition. While climbing the stairs, Malesko suffered a heart attack, fell, and injured himself. Malesko also claims that approximately ten days prior to this incident, he had run out of the medication prescribed for his heart condition, and that CSC had failed to replenish his medication as of that date.

On March 27, 1997, Malesko filed a pro se action against CSC in the United States District Court for the Southern District of New York, claiming violations of his rights in connection with the foregoing. Malesko did not name any specific individuals as defendants; instead, he named ten "unknown" "DOE" defendants. Malesko's complaint bore the following caption:

> JOHN E. MALESKO, Plaintiff against CORRECTIONAL SERVICES CORPORATION FORMERLY KNOW [sic] AS ESMOR CORRECTIONAL SERVICES INC., "JOHN DOE # 1 TO JOHN DOE # 10" INCLUSIVE, THE NAMES OF SAID JOHN DOE DEFENDANTS ARE PRESENTLY UNKNOWN BUT INTENDED TO INDICATE OFFICERS AND MANAGERS AND GUARDS OF THE CORPORATE DEFENDANT

On February 2, 1999, Malesko, by counsel, filed an Amended Complaint, which was identical to the initial complaint in all material respects except that it substituted Jorge Urena as "JOHN DOE DEFENDANT # 1" and alleged that Urena was the CSC employee who prevented Malesko's use of the elevator on March 28, 1994 and directed Malesko to climb the stairs.[1] On February 10, 1999, CSC moved to dismiss the Amended Complaint. On February 17, 1999, Malesko cross-moved seeking to file a second amended complaint to name as "DOE" defendants additional CSC employees allegedly responsible for Malesko's injuries.

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[1] Defendants-Appellees do not dispute that the CSC employee in question was Jorge Urena.

On July 28, 1999, the district court entered a judgment granting CSC's motion to dismiss the Amended Complaint, denying Malesko's motion to file a second amended complaint, dismissing the Amended Complaint as against Urena and instructing the Clerk of Court to close the case. *See Malesko v. Corrections Servs. Corp.*, No. 97 Civ. 4080(JSM), 1999 WL 549003 (S.D.N.Y. July 28, 1999). The district court treated Malesko's Amended Complaint as raising claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), which provides for a cause of action for damages against federal agents who violate constitutional rights.

The district court dismissed the Amended Complaint as to CSC on two grounds. First, it held that Malesko could not bring a *Bivens* claim against a corporation such as CSC because, according to the district court, "[a] *Bivens* action may only be maintained against an individual." *Id.* at *1. Second, the district court held that, even if Malesko could assert a *Bivens* claim against a private corporation, CSC was nevertheless "shielded from liability" because CSC had "contracted with the federal government to carry out a project on behalf of the government." *Id.*

The district court also denied Malesko's motion to file a second amended complaint naming additional specific CSC employees as defendants. The district court found that because the statute of limitations had run on Malesko's *Bivens* claims as of March 28, 1997 (one day after he filed his initial complaint), Malesko's subsequent assertion of such claims against additional defendants was time-barred and therefore a "futile amendment" under Fed R. Civ. P. 15. *See id.* at *2. The district court rejected Malesko's contention that his substitution of specifically named defendants for the "DOE" defendants should "relate back" to the filing date of his initial complaint. *See id.* at *2-*3.

The district court dismissed the Amended Complaint as to Urena on similar grounds, finding that the Amended Complaint substituting Urena as a defendant had been filed nearly two years after the statute of limitations had run. *See id.* at *3. This appeal followed.

DISCUSSION

I. Claims Against CSC

Because the district court dismissed Malesko's claims against CSC on the pleadings, we review that decision *de novo*, accepting as true all material factual allegations in the complaint. *See Jones v. New York Div. of Military and Naval Affairs*, 166 F.3d 45, 48 (2d Cir.1999).

A. *Bivens* Claims and Private Corporations

We note initially that the question of whether a *Bivens* claim may lie against a private corporation is an issue of first impression in this Circuit. The district court dismissed Malesko's *Bivens* claim against CSC because it concluded that a *Bivens* claim may only be asserted against an individual federal agent, not against private corporations such as CSC. The district court reached this result through a purported application of the Supreme Court's decision in *FDIC v. Meyer*, 510 U.S. 471, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994), which held that *Bivens* claims may not be brought against agencies of the federal government. *See Malesko*, 1999 WL 549003 at *1 (citing *Meyer*, 510 U.S. at 483-87). The district court did not explain why *Meyer*'s holding regarding federal agencies precluded a *Bivens* claim against CSC, which is not a federal agency. Reviewing this question de novo, we now hold that a private corporation acting under color of federal law may be subject to a *Bivens* claim.

Although the issue is new in this Circuit, several circuit courts recognized prior to the *Meyer* decision that *Bivens*-

type claims could be asserted against private corporations so long as the corporations engaged in "federal action," *i.e.*, they acted under color of federal law. *See, e.g., Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir.1987) (holding that private corporation employed by Department of Navy to provide security services would be subject to *Bivens* claims if, on remand, its actions were found to constitute federal action); *Gerena v. Puerto Rico Legal Serv., Inc.*, 697 F.2d 447 (1st Cir.1983) (recognizing that private entities may be subject to *Bivens* claims, but dismissing claims at issue against legal assistance corporation because it did not engage in federal action); *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219 (5th Cir.1982) (permitting *Bivens* claim against private contractor that supplied personnel, materials, transportation and services to federal government); *Yiamouyiannis v. Chemical Abstracts Serv.*, 521 F.2d 1392 (6th Cir.1975) (per curiam) (remanding for factual determination of whether private corporation engaged in federal action for purposes of *Bivens*). During this pre-*Meyer* time period, no circuit court ever held that private entities were not subject to *Bivens* claims.

In 1994, the Supreme Court addressed in *Meyer* whether "to expand the category of defendants against whom *Bivens*-type actions may be brought to include not only federal agents, but federal agencies as well." 510 U.S. at 484. *Meyer* involved a *Bivens* claim against the Federal Savings and Loan Insurance Corporation based on an alleged violation of an individual's due process rights. *See id.* at 484-85. The Court, noting that no Court of Appeals decision other than the decision on appeal had ever implied a *Bivens* cause of action directly against a federal agency, declined to do so for several reasons. First, part of the rationale for creating the *Bivens* cause of action against federal officials had been to compensate for the fact that "a direct action against the government was not available." *Id.* at 485. Second, allowing

Bivens suits against agencies would contravene "the purpose of *Bivens* [which] is to deter the officer." *Id.* The Supreme Court explained that, because a plaintiff bringing a *Bivens* claim against an agency could thereby avoid facing the qualified immunity defense available to officers, "there would be no reason for aggrieved parties to bring damages actions against individual officers" and "the deterrent effects of the *Bivens* remedy would be lost." *Id.* Finally, the Court, observing that "a direct action for damages against federal agencies . . . would be creating a potentially enormous financial burden for the Federal Government," refused to expand the government's direct liability without congressional legislation to that effect. *Id.* at 486.

Although *Meyer* addressed only whether *Bivens* claims could be brought against federal agencies and thus, on its face, did not appear to implicate the question of whether a private corporation could be sued under *Bivens*, other circuits have subsequently reached differing conclusions regarding its impact on such claims. In the D.C. Circuit, the Court of Appeals has held that *Meyer* precludes *Bivens* suits against private entities acting under color of federal law, thereby overruling an earlier pre-*Meyer* D.C. Circuit decision allowing such claims. *See Kauffman v. Anglo-American School of Sofia*, 28 F.3d 1223 (D.C.Cir.1994), overruling *Reuber v. United States*, 750 F.2d 1039 (D.C.Cir.1985).[2] Declaring in *Kauffman* that its decision was "controlled by *FDIC v. Meyer*," the D.C. Circuit, over a vigorous dissent by then-Chief Judge Mikva, held that *Bivens* claims could not be asserted against the Anglo-American School of Sofia, a

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[2] In *Reuber*, the D.C. Circuit had held that *Bivens* encompassed actions against private parties acting under color of federal law, and had remanded the case for a determination of whether the defendant, an operator of a government-owned facility pursuant to a contract with the National Cancer Institute, had so acted. *Id.*

"private and independent organisation" established by the U.S. Department of State "to provide elementary-level instruction to the children of American and British diplomats stationed in Sofia, Bulgaria." 28 F.3d at 1224 (internal quotation marks omitted). The *Kauffman* majority reasoned that because a private entity must act under color of federal law in order to be subject to *Bivens*, such an entity is "equivalent" to a federal agency and, under *Meyer*, must be treated as "if [it] were really a federal agency." *Id.* at 1227.

The *Kauffman* majority, echoing *Meyer*'s rationale that the deterrence purpose of *Bivens* would be frustrated if claims could be asserted against federal agencies, found that employees of private entities would be undeterred from engaging in unconstitutional conduct if claims could be asserted against their employers. *See id.* at 1227. The court similarly adopted *Meyer*'s reasoning that *Bivens* claims against federal agencies would create a "potentially large financial drain on the government" and concluded that the "diversion of resources from a private entity created to advance federal interests has effects similar to those of diversion of resources directly from the [federal] Treasury" because such costs would be passed on to the government. *Id.* at 1227-28. The *Kauffman* majority thus held that *Meyer*'s reasoning precluded *Bivens* claims against private entities acting under color of federal law. *Id.* at 1228.

In contrast, the Sixth Circuit in *Hammons v. Norfolk Southern Corp.*, 156 F.3d 701 (6th Cir.1998), concluded that "[n]othing in *Meyer* prohibits a *Bivens* claim against a private corporation that engages in federal action," and held that such claims should be allowed. *Id.* at 705. The *Hammons* court observed that while *Meyer* had focused on *Bivens*'s deterrence rationale in concluding that claims should not be asserted against federal agencies, "the primary goal of *Bivens* was to provide a remedy for victims of constitutional violations by federal agents where no other remedy exists,

regardless of whether the official would be deterred in the future from engaging in such conduct." *Id.* at 706 (citing *Bivens*, 403 U.S. at 407-08 (Harlan, J., concurring)). The court therefore concluded that "the importance of remedying constitutional violations" favored the allowance of *Bivens* claims against private entities acting under color of federal law regardless of whether such allowance deterred future violations. *Id.* The *Hammons* court also found, in contrast to the D.C. Circuit, that *Meyer*'s concern about "the potentially enormous financial burden on the Government" was inapplicable with respect to private corporations because claims against private corporations do not directly impact the "federal purse" and thus "do[ ] not implicate federal fiscal policy." *Id.* (citations and internal quotation marks omitted).

Having determined that "*Meyer* [was] not dispositive" on the matter, *id.* at 706, the Sixth Circuit proceeded to address whether private corporations should be subject to *Bivens* claims. The court observed that *Bivens* claims against federal officers have consistently been treated in the same manner as claims against state officers under 42 U.S.C. § 1983 (1994). *See id.* at 707 ("[T]he standards of liability in *Bivens* actions are similar to the standards under § 1983. Both the Supreme Court and this Court have noted that actions brought under § 1983 raise identical concerns as those raised in *Bivens* actions." (citing *Butz v. Economou*, 438 U.S. 478, 500, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978))). The court further noted that "[i]t is undisputed that corporations engaging in state action can be sued under § 1983." *Id.* (citations omitted). Accordingly, the *Hammons* court held that corporations engaging in federal action should, by analogy, be subject to *Bivens* claims. *See id.* at 708. In so holding, the court observed that it joined the Courts of Appeals for the First, Fifth and Ninth Circuits in their conclusions (albeit pre-*Meyer*) that a *Bivens* claim may be brought against private corporations engaging in federal action. *See id.*

We find the Sixth Circuit's analysis in *Hammons* persuasive and, substantially for the reasons articulated by that court, we hold that a private corporation acting under color of federal law may be sued under *Bivens*. As an initial matter, we do not believe that *Meyer* is dispositive here because private entities acting on behalf of the federal government are not the equivalent of federal agencies. In *Cohen v. Empire Blue Cross*, 176 F.3d 35 (2d Cir.1999), we found that Empire Blue Cross, acting as a fiscal intermediary on behalf of the government to process Medicare claims, was akin to an agent of the government and not a federal agency. *See id.* at 42 ("[Defendant] is a private not-for-profit corporation established under the laws of the State of New York. It is not funded by the United States, and the United States has no proprietary interest in its operations. . . . [It] may act as an agent for the government, [but] it is not an institutional arm of the government such as a department, commission, board, or bureau."). We see no reason to treat differently other private corporations acting on behalf of the government.

Moreover, the reasons the Supreme Court articulated in *Meyer* for declining to extend liability to federal agencies are not compelling with respect to the question of whether private corporations should be subject to *Bivens* liability. Although deterring wrongdoing by individuals is an important goal of *Bivens* liability, we find an extension of such liability to be warranted even absent a substantial deterrent effect in order to accomplish the more important *Bivens* goal of providing a remedy for constitutional violations. Justice Harlan, in his concurring opinion in *Bivens*, elaborated upon the relationship between these two goals:

> I agree with the Court that the appropriateness of according *Bivens* compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct. Damages as a traditional form

> of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result. Bivens, after all, has invoked judicial processes claiming entitlement to compensation for injuries resulting from allegedly lawless official behavior, if those injuries are properly compensable in money damages. I do not think a court of law—vested with the power to accord a remedy—should deny him his relief simply because he cannot show that future lawless conduct will thereby be deterred.

Bivens, 403 U.S. at 407-08 (Harlan, J., concurring). In any event, we are not convinced that allowing *Bivens* claims against private corporations would undermine the deterrence purpose of *Bivens*. Even assuming a plaintiff would decline to sue the offending employee and sue only the employer, we believe that an employer facing exposure to such liability would be motivated to prevent unlawful acts by its employees. Furthermore, although a private entity contracting to carry out governmental functions might pass on the costs of *Bivens* liability to the government, we do not believe such liability has the type of direct impact on federal fiscal policy that the Supreme Court in *Meyer* was concerned would result from imposing *Bivens* liability directly upon federal agencies.[3]

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[3] In our view, the non-unanimous *Kauffman* decision finding such impact is incorrect, or, at best, resulted from the fact that the entity at issue was arguably a federal government agency. Although the *Kauffman* majority referred to the defendant school as a "private" entity, the school had been set up by the U.S. Department of State, part of its governing board was appointed by a U.S. ambassador, and it was directly funded, in part, by the U.S. government. *See Kauffman*, 28 F.3d at 1224.

Finally, as noted above, several Courts of Appeals before *Meyer*'s issuance recognized that private corporations may be subject to *Bivens* claims. We are not persuaded that the Supreme Court implicitly overruled this long line of cases in the *Meyer* opinion without making reference to any of them. We therefore find that *Meyer* does not control our analysis of whether *Bivens* claims may be brought against private corporations.

In deciding that *Bivens* liability should extend to private corporations, we are influenced strongly by the law governing § 1983 claims. We have consistently treated *Bivens* and § 1983 actions as analogous for most purposes, and we "have typically incorporated § 1983 law into *Bivens* actions." *Tavarez v. Reno*, 54 F.3d 109, 110 (2d Cir.1995) (per curiam) (citing *Carlson v. Green*, 446 U.S. 14, 18-20, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980)); *see also Ayeni v. Mottola*, 35 F.3d 680, 688 n. 10 (2d Cir.1994); *Ellis v. Blum*, 643 F.2d 68, 84 (2d Cir.1981). The Supreme Court has made it clear that private corporations engaging in state action may be sued under § 1983. *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936-37, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). We see no reason not to incorporate that law into the *Bivens* context and permit suits against private corporations engaging in federal action. Moreover, we find that extending *Bivens* liability to reach private corporations furthers *Bivens*'s overriding purpose: providing redress for violations of constitutional rights. *See Bivens*, 403 U.S. at 407-08 (Harlan, J., concurring).

Accordingly, we join the Courts of Appeals for the First, Fifth, Sixth and Ninth Circuits and hold that a private corporation acting under color of federal law may be subject to liability under *Bivens*.

B. Government Contractor Defense

In addition to finding that a *Bivens* action could not be maintained against CSC, the district court held that CSC would have been immune from such a suit in any event by virtue of the immunity for government contractors set forth in *Boyle v. United Technologies, Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). *See Malesko*, 1999 WL 549003 at *1 (citing *Boyle*, 487 U.S. at 505-09; *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 19, 60 S.Ct. 413, 84 L.Ed. 554 (1940); *Norwood v. Esmor, Inc.*, No. 95 Civ. 8281(LAP), 1997 WL 65913 (S.D.N.Y. Feb.13, 1997)). We disagree and hold that on the record presented to the district court, CSC may not avail itself of the government contractor defense.

In *Boyle*, the Supreme Court articulated the standard for determining when federal law shields government contractors from state tort liability arising from design defects in military equipment. *See Boyle*, 487 U.S. at 512. The Supreme Court held:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Boyle, 487 U.S. at 512. The Supreme Court reasoned that "selection of the appropriate design for military equipment" involved "judgment as to the balancing of technical, military, and even social considerations" that should not be "second-guess[ed] . . . through state tort suits against contractors" carrying out the design specifications of the federal government. *Id.* at 511 (citations and internal quotation marks omitted). Thus, the Court concluded that "state law which holds Government contractors liable for design defects in

military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced." *Id.* at 512.

Although the government contractor defense has primarily developed in the context of military contractors, the defense has been applied more broadly by some courts to protect contractors in non-military contexts. *See, e.g., Boruski v. United States*, 803 F.2d 1421, 1430 (7th Cir.1986) (defense applies in "civilian relationships" where "a contractor has acted in the sovereign's stead and can prove the elements of the defense") (citation and internal quotation marks omitted); *Burgess v. Colorado Serum Co.*, 772 F.2d 844, 846 (11th Cir.1985) ("Both the history of the defense and its general rationale lead us to the conclusion that it would be illogical to limit the availability of the defense solely to 'military' contractors"). This Circuit has never expressly addressed the issue.[4] However, this case does not present the appropriate forum in which to do so since, even assuming the potential applicability of the defense outside the military context, the requirements necessary for its application are not satisfied here.

The government contractor defense only shields a government contractor from claims arising out of its actions where the government has exercised its discretion and judgment in approving precise specifications to which the contractor must adhere. *See Lewis v. Babcock Indus., Inc.*,

[4] We also question, although need not decide, whether the government contractor defense may ever be invoked as a shield against *Bivens* claims. As the Court in *Boyle* explained, the government contractor defense exists to protect against situations where the "application of state law [claims] would frustrate specific objectives of federal legislation." *Id.* at 507 (internal quotation marks omitted) (emphasis added). The *Bivens* cause of action, however, was created to advance federal constitutional interests. Such claims are not state law claims but rather arise under the U.S. Constitution.

985 F.2d 83, 86-87 (2d Cir.1993) (holding that government contractor defense requires "that the design feature in question was considered by Government officers, and not merely by the contractor"). In other words, "[s]tripped to its essentials," the government contractor defense is "to claim, 'The Government made me do it.'" *In re Joint Eastern and Southern Dist. New York Asbestos Litg.*, 897 F.2d 626, 632 (2d Cir.1990). Here, Malesko alleges that various CSC policies or practices led to his injury—assigning him to a room on the fifth floor, forbidding him from using the elevator, and failing to refill his heart medication prescription—but neither he nor CSC claims that the government played any role in formulating or approving these policies or practices. Because no allegation exists in the record before the district court that the government played any role in these decisions, we conclude that the district court erred in holding that CSC was protected from liability by the government contractor defense. *See, e.g., In re Hawaii Asbestos Cases*, 960 F.2d 806, 813 (9th Cir.1992) (holding that suppliers of insulation products containing asbestos to the Navy could not invoke defense where suppliers "simply failed to allege, let alone establish, that . . . they were acting in compliance with 'reasonably precise specifications' imposed on them by the United States") (quoting *Boyle*, 487 U.S. at 512).

II. Claims Against Individual Defendants

The district court dismissed the *Bivens* claims against Jorge Urena on the ground that the claims were time-barred. *See Malesko*, 1999 WL 549003 at *3. For the same reason, the district court denied as "futile" Malesko's motion to file a second amended complaint substituting additional specific individuals for "DOE" defendants. *Id.* at *2-*3. We review *de novo* the district court's dismissal of the *Bivens* claims against Urena on the pleadings. *See Jones*, 166 F.3d at 49. We review the district court's denial of leave to amend the complaint for

abuse of discretion. *Id.* If that denial was based on a legal interpretation, however, we review the decision *de novo*. *Id.*

In New York, the statute of limitations for bringing a *Bivens* action is three years from the accrual of the claim. *See Chin v. Bowen*, 833 F.2d 21, 24 (2d Cir.1987). The parties do not dispute that Malesko's claim accrued on March 28, 1994, the day on which he suffered his heart attack while climbing the CSC stairs. Thus, the statute of limitations on Malesko's *Bivens* claims expired on March 28, 1997, one day after he filed his original complaint.

Malesko, however, did not identify any of the alleged "DOE" defendants listed on his original complaint until February 2, 1999, when he submitted an Amended Complaint substituting Jorge Urena as "JOHN DOE DEFENDANT # 1." On February 17, 1999, Malesko moved for leave to file a second amended complaint that would purportedly have substituted additional CSC employees as "DOE" defendants. It is therefore clear from the record that the statute of limitations expired on Malesko's *Bivens* claims before he added or sought to add any individual defendants. Malesko attempts to avoid this conclusion by arguing that, pursuant to Fed.R.Civ.P. 15(c), the date of filing for his amendments identifying individual defendants may "relate back" to the timely date on which the original complaint was filed. *See Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1075 (2d Cir.1993) (stating that " 'John Doe' pleadings" can "be used to circumvent statutes of limitations" where "all the specifications of Fed.R.Civ.P. 15(c) are met").

Under Rule 15(c), when an attempt is made to bring in a new party, the date of the amendment adding that party will "relate back" to the date of the original complaint only when (1) the claim arises out of the same conduct originally pleaded and (2) within (ordinarily) 120 days of the original filing date,

> the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed.R.Civ.P. 15(c)(3) (emphasis added). Thus, in order to have the filing dates for the Amended Complaint and second amended complaint relate back to the date of the original Complaint, Malesko must show, *inter alia*, that he failed to name Urena and other specific CSC employees due to a "mistake concerning the identity of the proper party." Fed.R.Civ.P. 15(c)(3)(B). A plaintiff is not considered to have made such a "mistake," however, if the plaintiff knew that he was required to name an individual as a defendant but did not do so because he did not know the individual's identity. *See Barrow v. Wethersfield Police Dep't*, 66 F.3d 466, 470 (2d Cir.1996) ("Rule 15(c) does not allow an amended complaint adding new defendants to relate back if the newly-added defendants were not named originally because the plaintiff did not know their identities.").

Here, it is clear that Malesko believed that there existed individual defendants who were potentially liable for his injuries, but did not know their exact identities prior to the expiration of the statute of limitations. As revealed by the caption from his original complaint, Malesko "INTENDED TO INDICATE OFFICERS AND MANAGERS AND GUARDS OF THE CORPORATE DEFENDANT [CSC]," but he did not do so because "THE NAMES OF SAID JOHN DOE DEFENDANTS ARE PRESENTLY UNKNOWN." Under these circumstances, Malesko cannot avail himself of Rule 15(c) such that his untimely substitution of specifically named individuals for "DOE" defendants may "relate back" to the date he filed his original complaint. *See Tapia-Ortiz v.*

Doe, 171 F.3d 150, 151-52 (2d Cir.1999) (holding that plaintiff, who, in his original complaint, sued "Doe" defendant officers who allegedly applied excessive force, could not "relate back" his amendment naming specific officers two years after the statute of limitations had run); *Barrow*, 66 F.3d at 470 (holding that plaintiff named "John Does" because he did not know the arresting officers' names and that, "[s]ince the new names were [subsequently] added not to correct a mistake but to correct a lack of knowledge, the requirements of Rule 15(c) for relation back are not met").

We therefore affirm the district court's decision dismissing the Amended Complaint as to Urena and denying Malesko's motion to file the second amended complaint because these claims were barred by the statute of limitations.

CONCLUSION

For the foregoing reasons, we affirm the district court's dismissal of *Bivens* claims against defendant Urena and its denial of leave to file the second amended complaint, but vacate the district court's dismissal of claims against CSC and remand for further proceedings consistent with this opinion.[5]

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[5] In a discussion spanning less than one page of his appellate brief, Malesko argues for the first time that he is entitled to recover under the Americans With Disabilities Act, 42 U.S.C. § 12131, *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. § 794. Although CSC invites us to address the merits of these claims, we decline to do so. The district court may consider the arguments on remand after the issue has been adequately briefed. *See Able v. United States*, 88 F.3d 1280, 1292 (2d Cir.1996) (declining to address the merits of a claim where the issue was not considered in the district court and remanding for such consideration).

APPENDIX B

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

No. 97 Civ. 4080(JSM).

JOHN E. MALESKO,

Plaintiff,

v.

CORRECTIONAL SERVICES CORPORATION, JORGE URENA and JOHN DOE # 2 to JOHN DOE # 10.

Defendants.

July 28, 1999.

MEMORANDUM OPINION AND ORDER

MARTIN, J.

This case is before the Court on Defendant Correctional Services Corporation's ("CSC") motion to dismiss per Rule 12(b)(6) and Plaintiff's motion to amend the Complaint per Rule 15.

FACTS

On December 3, 1992, Judge Freeh sentenced Plaintiff to eighteen month's imprisonment following his conviction for securities fraud. During his imprisonment, Bureau of Prisons medical personnel determined that Plaintiff suffered from congestive heart failure and prescribed drugs to treat this condition. On February 4, 1994, the BOP transferred Plaintiff, along with his medical records, to the Le Marquis halfway house at 15 East 31st Street in Manhattan. Defendant CSC operates the Le Marquis facility.

CSC assigned Plaintiff to a bedroom on the fifth floor of the Le Marquis facility. Despite a policy prohibiting inmates assigned to lower floors from using the elevator, CSC granted Plaintiff permission to use the elevator in light of his medical condition. On March 28, 1994, Plaintiff returned to Le Marquis from a weekend furlough and attempted to use the elevator to get to his room in time for a head count. Jorge Urena, a CSC employee, prohibited Plaintiff from using the elevator and forced him to use the stairs. While ascending the staircase Plaintiff experienced a heart attack, fell down and injured his left ear.

PROCEDURAL HISTORY

On March 27, 1997, Plaintiff filed a complaint with the Court's Pro Se office alleging constitutional torts and violation of Plaintiff's right to "equal access." On September 15, 1997, CSC filed a motion to dismiss the Complaint and the Court denied this motion on January 6, 1998. CSC answered the Complaint on April 16, 1998. Following oral argument on January 19, 1999, the Court granted Plaintiff, by then represented by counsel, permission to file an amended complaint. On February 2, 1999, Plaintiff did so and CSC moved to dismiss the Amended Complaint on February 10, 1999. Among other changes, the Amended Complaint names one of the ten John Doe defendants as Jorge Urena. On March 17, 1999, Plaintiff moved to file a second amended complaint.

I. Motion to Dismiss the Complaint

CSC moves to dismiss the Amended Complaint on two independent grounds: first, that Plaintiff cannot bring a *Bivens* action against a corporation; and, second, that CSC is immune to suit because it is a government contractor.

A *Bivens* action may only be maintained against an individual. *F.D.I.C. v. Meyer*, 510 U.S. 471, 483-487, 114

S.Ct. 996, 1004-1006 (1994). Subsequent cases cited by the Plaintiff do not undermine this holding. *Richardson v. McKnight*, 521 U.S. 399, 117 S.Ct. 2100 (1997) (Individual prison guards hired by private contractor liable under 42 U.S.C. § 1983).

Even if Plaintiff had a valid claim, Defendants would still prevail because they are immune from suit. A private party that has contracted with the federal government to carry out a project on behalf of the government is shielded from liability by the doctrine of sovereign immunity. *Boyle v. United Technologies*, 487 U.S. 500, 505-09, 108 S.Ct. 2510, 2515-17 (1988); *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 19, 60 S.Ct. 413, 414 (1940); *Norwoood v. Esmor*, 1997 WL 65913 (S.D.N.Y. Feb. 13, 1997). CSC has not waived its immunity to suit and thus cannot be sued.

For these reasons, the Amended Complaint is dismissed as to defendant CSC.

II. Motion to Amend the Complaint

> A party may amend its pleading:
> once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served.

Fed.R.Civ.P. 15(a).

Other amendments are only permitted with leave of the Court. *Id.* While "leave shall be freely given when justice so requires," a court need not approve a futile amendment. *Jones v. New York State Div. of Military and Naval Affairs*, 166 F.3d 45, 49 (2d Cir.1999).

Because the statute of limitations on Plaintiff's claim ran on March 28, 1997, (one day after he filed the original Complaint) the addition of new defendants raises the question of whether the Amended Complaint of February 2, 1999 or the proposed second amended complaint relate back to the timely filed Complaint. *See Owens v. Okure*, 488 U.S. 235, 236, 109 S.Ct. 573, 574 (1989); *Soto v. Brooklyn Correctional Facility*, 80 F.3d 34, 35 (2d Cir.1996) (Statute of limitations on section 1983 claims is three years.)

Rule 15(c) allows an amendment to relate back to the date of the original pleading if:

> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed R. Civ. P. 15(c).

A plaintiff's failure to name individual defendants when the plaintiff knows that such individuals must be named is not a mistake as contemplated by Rule 15(c). *Barrow v. Wethersfield Police Dept.*, 66 F.3d 466, 470, *modified*, 74

F.3d 1366 (2d Cir.1996). Rule 15(c) does not permit a Section 1983 plaintiff to relate back an amendment that names parties who were unknown to the plaintiff at the filing of the original complaint. *Id.*

A plaintiff may relate back an amended complaint when the inadequacy of the original complaint evidences a legal or factual mistake, *e.g.*, misunderstanding the legal requirements of the cause of action or misapprehending the true identities of the people sought to be sued. *Soto v. Brooklyn Correctional Facility*, 80 F.3d 34, 36 (2d Cir.1996).

The original complaint in this action is styled "John Malesko v. Correctional Services Corporation . . . and John Doe # 1 to John Doe # 10 inclusive, the names of said John Doe defendants are presently unknown but intended to indicate officers and managers and guards of the corporate defendant." Based upon the caption of the Complaint, Plaintiff knew at the time of filing that he was required to name individual defendants. His failure to identify individual defendants within the limitations period leads to only two conclusions: that he knew the names of the individual defendants and declined to include them or that the identities of the John Does were unknown to him when he filed the Complaint. Neither of these reasons is a factual or legal mistake sufficient to trigger the relation back provision of Rule 15(c). *See Barrow*, 66 F.3d at 469; *Soto*, 80 F.3d at 36-37; *Cornwell v. Robinson*, 23 F.3d 694, 705 (2d Cir.1994); *Doyle v. Coombe*, 976 F.Supp. 183, 191-192 (W.D.N.Y.1997); *Thomas v. Arevalo*, 1998 WL 427623 (S.D.N.Y. July 28, 1998); *Green v. New York City Dept. of Corrections*, 1997 WL 96548 (S.D.N.Y. March 5, 1997); *Fitzgerald v. McKenna*, 1996 WL 715531 (S.D.N.Y. Dec. 11, 1996).

Amending the Complaint to add individual defendants would not relate back to the date of the original complaint, and any amendment would therefore be untimely. Because

granting leave to amend the Complaint would be futile, the application is denied.

For the same reason, the Court dismisses the individual claims against Jorge Urena. While the Court did grant Plaintiff leave to amend the Complaint, that leave did not extend to the addition of defendants as to whom the statute of limitations has run.

For the foregoing reasons the Amended Complaint is dismissed with prejudice and the motion to file a second amended complaint is denied. The Clerk of Court is instructed to close this case.

SO ORDERED.

RESPONSE REQUESTED

CRIGINAL

Supreme Court U.S.
FILED
FEB 5 2001
CLERK

No. 00-860

IN THE

SUPREME COURT of the UNITED STATES

CORRECTIONAL SERVICES CORP.,

Petitioner,

v.

JOHN E. MALESKO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a private corporation, operating a correctional facility under color of federal law, be held liable under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1997), for its violation of an inmate's constitutional rights?

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STATEMENT OF THE CASE

A. Factual Background

Le Marquis Community Corrections Center is a halfway house operated under a Bureau of Prisons contract by petitioner Correctional Services Corp. ("CSC"), a for-profit prison corporation. Respondent John Malesko was an inmate of Le Marquis who suffered from congestive heart failure. His condition required daily medication and made it unsafe for him to climb the five flights of stairs to his room.

Mr. Malesko routinely took his prescribed medication and CSC ordinarily allowed him to take the elevator. But on or about March 18, 1994, CSC knowingly refused/failed to provide Mr. Malesko the pills he needed to control his condition even though CSC knew that his supply was exhausted. On March 28, a CSC guard refused to allow him to take the elevator from the ground floor to his room, and threatened him with a return to prison unless Mr. Malesko reached his room in time for the head count. As he hurried up the stairs, Mr. Malesko suffered a heart attack and fell.

The fall injured his ear, causing a severe balance problem that has left him disabled.

CSC created no paperwork regarding Mr. Malesko's injury, the fact that an ambulance was called to transport him to the hospital, or anything to indicate that something had happened that day to Mr. Malesko. As Mr. Malesko was recovering from his injuries in hospital, a CSC employee told him it would have been better for all concerned if Mr. Malesko had died.

B. Decisions Below

Mr. Malesko filed this action pro se on March 27, 1997, in the United States District Court for the Southern District of New York claiming damages under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1997), against petitioner CSC and ten "John Doe" defendants. On February 2, 1999, Mr. Malesko by counsel filed an amended complaint naming Jorge Urena, the guard who denied him use of the elevator, as one of the John Doe defendants. CSC filed a motion to dismiss, which the district court granted on July 28, 1999. In that decision, the district court

held that because Mr. Malesko's identification of Mr. Urena in the amended complaint did not relate back to the filing of the original complaint, it was time-barred. Malesko v. Correctional Servs. Corp., No. 97 CIV 4080 (JSM), 1999 U.S. Dist. LEXIS 11403, 1999 WL 549003 (S.D.N.Y. July 28, 1999). [App. at 24a] With no explanation of its reasoning, the district court held that under Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471 (1994), a Bivens action can be maintained only against an individual. [App. at 21a.] Meyer in fact held only that no Bivens action lies against federal agencies.

The Second Circuit reversed as to CSC, but affirmed as to Mr. Urena. The panel held that a Bivens action may lie against private corporations acting under color of federal law. Such a cause of action serves the Bivens interests in remedying constitutional violations and in deterrence, by motivating the corporation to "prevent unlawful acts by its employees." Malesko v. Correctional Servs. Corp., 229 F.3d 374, 380 (2d Cir. 2000) [App. at 11a]. The court rejected CSC's argument

that Meyer controlled, observing that private corporations performing core governmental functions under contract with the federal government "are not the equivalent of federal agencies." Id. [at 10a] The panel further concluded that Meyer's reasons for limiting Bivens are inapposite here. A successful Bivens action against a private corporation can serve Bivens' compensatory and deterrence goals without jeopardizing the public purse.

REASONS FOR DENYING THE WRIT

This Court should deny review. First, the circuits are in substantial accord that a Bivens cause of action lies against a private corporation acting under color of federal law. This Court should follow its general rule and ascertain whether a conflict develops before reviewing the issue. Second, the Second Circuit's decision is consistent with this Court's Bivens precedents, and presents no plain error in need of correction. Finally, it is well-settled that private corporations are liable for their torts in state law, and when they engage in state action, they are also

liable under Bivens or 42 U.S.C. 1983. While the Bivens cause of action opens a federal forum to certain plaintiffs, CSC overstates its practical importance because it maintains insurance to defray its tort liability and plaintiffs can always seek state law remedies against private defendants. But the availability of Bivens remedies furthers the important objective of ensuring that where, as here, private parties assume core governmental functions for profit, they can be held accountable for their constitutional violations in federal court.

I. THERE IS NO SPLIT BETWEEN THE CIRCUITS.

The decision below is yet another link in a long chain of circuit precedent holding that a cause of action exists against private defendants acting under color of federal law. This settled rule has now been recognized in five circuits, including the Second. The Sixth Circuit recently addressed the same question in Hammons v. Norfolk Southern Corp., 156 F.3d 701 (6th Cir. 1998). There, a railroad employee whose private employer had tested him for drugs brought a Bivens

claim against the employer. The Sixth Circuit found that a Bivens cause of action was available.

Hammons itself simply elaborated the Sixth Circuit rule established twenty-three years earlier in Yiamouyiannis v. Chemical Abstracts Serv., 521 F.2d 1392 (6th Cir. 1975) (per curiam). In the 1980s, the Fifth, Ninth, and First Circuits also recognized that a private entity engaging in federal action may face Bivens liability. See Dobyns v. E-Systems, Inc., 667 F.2d 1219 (5th Cir. 1982) (private contractor providing personnel, materials and services to federal government); Schowengert v. General Dynamics Corp., 823 F.2d 1328 (9th Cir. 1987) (private corporation contracted to provide security services to Navy Department); Gerena v. Puerto Rico Legal Serv., Inc., 697 F.2d 447 (1st Cir. 1983) (acknowledging cause of action, but finding no government actor). These decisions are all still good law.

In attempting to demonstrate a circuit split, petitioner relies entirely on Kauffman v. Anglo-American School of Sofia, 28 F.3d 1223 (D.C. Cir.

1994). Kauffman is factually unique, and easily distinguishable from the present case. In Kauffman, "the entity at issue was arguably a federal government agency," Malesko, 229 F.3d at 380 n.3 [App. at 11a]; here, the defendant is a large private corporation operating a for-profit prison. The Kauffman defendant was an elementary school established and in part funded by the U.S. Department of State to educate the children of American and British diplomats stationed in Sofia, Bulgaria. Six members of the school's seven-member governing board were appointed by the American and British ambassadors, and all the American appointees were State Department employees. 28 F.3d at 1224.

In contrast, the only connection alleged between CSC and the government is contractual. CSC is a private, publicly traded, for-profit corporation that operates a halfway house for the Bureau of Prisons pursuant to contract. Unlike the quasi-governmental defendant in Kauffman, the defendant here cannot plausibly be portrayed as a government entity. Nor would a judgment against CSC take money from the public

fisc, the integrity of which was an important consideration in Kauffman, Meyer, and the decision below. Although the Kauffman panel never reached this question, it appears that liability in that case would have fallen on federal employees and perhaps in part on the State Department. However broadly the D.C. Circuit may have painted its holding, the facts of the cases are so different that the decisions cannot plausibly be said to conflict.

All the circuits to face the question presented are in agreement that cases like this may proceed. This Court should not strain to find conflict where none exists. If and when a circuit split develops, this Court can resolve it.

II THE SECOND CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S HOLDINGS IN BIVENS AND LUGAR V. EDMONSON OIL CO., 457 U.S. 922 (1982).

In Bivens, this Court recognized a cause of action for damages arising out of a federal agent's violation of constitutional rights while acting under color of his authority. This Court has also specifically held that a Bivens action may be grounded in failure to

provide a prisoner with medical attention. Carlson v. Green, 446 U.S. 14, 18-19 (1980), quoting Bivens, 403 U.S. at 396. There is no dispute here that CSC was acting under color of federal law. See, e.g., Pet. at 14. Nor is there any dispute that a Bivens cause of action would exist against CSC's officers as individuals.[1]

CSC's sole contention is that even though it was performing a core government function under contract with the federal government, its corporate status shields it from Bivens liability. There is simply no support for petitioner's claim, nor is there any policy reason why a private corporation should be permitted to stand in the government's shoes for the purpose of making a profit, but claim immunity from governmental liability when the corporation violates an individual's constitutional rights -- a violation made possible only because of the corporation's special status.

As this Court has explained, a Bivens action does

[1] CSC's position is that the question of its employees' liability is not presented. Pet. at 5 n.1.

not lie if defendants can show (1) "'special factors counseling hesitation in the absence of affirmative action by Congress,'" or (2) that Congress has explicitly provided a substitute remedy. Green, 446 U.S. at 18, quoting Bivens, 403 U.S. at 396. No suggestion has been made here that the latter exception applies. Nor are there any "special factors" here "counseling hesitation". In Meyer, this Court declined to find a Bivens cause of action against federal agencies for two reasons. First, the Court concluded that Bivens was founded on the premise that federal agencies could not be directly sued for constitutional violations. 510 U.S. at 485. Second, one of Bivens's "special factors" was present: "if we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government." Id. at 486.

Meyer's reasoning is wholly inapplicable here. A cause of action against CSC poses no threat to Bivens's bedrock assumptions. Nor would it create a financial threat to the federal government. Malesko, 229 F.3d at

379 [App. at 9a] ("claims against private corporations do not directly impact the 'federal purse' and thus do[] not implicate federal fiscal policy'") (quoting Hammons, 156 F.3d at 706). CSC would be liable for any award in this case, and CSC carries (per the Government's requirement) liability insurance for that very reason. Cf. Richardson v. McKnight, 521 U.S. 399, 407-12 (1997) (discussing different incentives facing privately-operated, rather than government, prison). Furthermore, CSC is exposed to its employees' liability and it is unimaginable that it has not agreed to indemnify its employees. See id. Indeed, during the course of the litigation, CSC acknowledged that it would indemnify the individuals.

This conclusion is further bolstered by this Court's 42 U.S.C. § 1983 jurisprudence. Courts often look to § 1983 law as a parallel to the Bivens action. See, e.g., Green, 446 U.S. at 18-20); Butz v. Economou, 438 U.S. 478, 500 (1978); see also Wilson v. Layne, 526 U.S. 603, 609 (1999). It is well settled that § 1983 establishes a cause of action against a private

corporation that violates the constitution under color of state law. Lugar v. Edmonson Oil Co., 457 U.S. 922, 936-37 (1982); see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 171 (1970). The courts of appeals have correctly concluded that so does Bivens.

III. THE COURT BELOW CORRECTLY IMPOSED BIVENS LIABILITY ON THE PRIVATE OPERATOR OF A CORRECTIONAL FACILITY.

A private entity that steps into the shoes of government for profit should be held to constitutional standards. The privatization of core government activities -- such as law enforcement -- may save the government money, but should not erode constitutional protections against those acting under color of state law. As this Court observed in Bivens, "[a]n agent acting -- albeit unconstitutionally -- in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." 403 U.S. at 392. Nor should the government be permitted to hire corporations to do what the government itself may not.

Bivens, Meyer, and to some extent Kauffman

presented difficult policy questions about liability for wrongs committed by the sovereign and its officers, and the financial impact of that liability. These concerns are absent here. In every state, individuals may sue corporations for the torts they commit. In many states, including New York, private employers are liable for many of their employees' torts. See Riviello v. Waldron, 47 N.Y.2d 297, 304 (1979). More specifically, suits against private correctional facilities have a longstanding history, which this Court reviewed in McKnight, 521 U.S. at 404-07. McKnight not only accepted § 1983 liability for employees of private prisons, but held that they are not entitled to qualified immunity.

CSC has freely chosen to provide correctional services for profit, notwithstanding its exposure to liability for torts against its inmates. The government has likewise freely chosen to invest CSC with federal power. If the uniform circuit precedent imposing Bivens liability on private corporations were of any financial concern to the government, it could

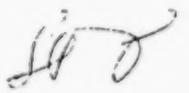
contract with another corporation or -- protected by Meyer and qualified immunity for its employees -- operate its own prisons. But the government cannot strip its citizens of constitutional protections by placing them in the physical custody of private corporations.

CONCLUSION

For the reasons set forth above, this petition should be denied.

Thank you for your courtesies.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that on this date, I caused two copies of the brief in opposition to the petition and the motion to proceed in forma pauperis to be delivered via regular U.S. mail, postage pre-paid, upon Carter Phillips at Sidley & Austin, 1722 Eye Street, NW, Washington, DC 20006.

I hereby certify that the foregoing statement made by me is true. I am aware that if it is willfully false, I may be subject to punishment.

Dated: February 1, 2001

STEVEN PASTERNAK

01/31/2001 12:02 9729947931

No. 00-966

IN THE

SUPREME COURT OF THE UNITED STATES

[illegible] — PETITIONER
(Your Name)

VS.

[illegible] — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

N.Y FEDERAL COURT - PROSE

MALECKO VRS ESSMOR (THIS CASE

[ ] Petitioner has not previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

(Signature)

BEST AVAILABLE COPY

Jan. 31 2001 08:20PM P1

FROM :

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, JOHN E MALESKO, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ —	$	$ —	$
Self-employment	$ —	$	$ —	$
Income from real property (such as rental income)	$ —	$	$ —	$
Interest and dividends	$ —	$	$ —	$
Gifts	$ —	$	$ —	$
Alimony	$ —	$	$ —	$
Child Support	$ —	$	$ —	$
Retirement (such as social security, pensions, annuities, insurance)	$ 669.00 - 50 MED ICARE	$	$ 669.00 - 50.00 MED. CARE	$
Disability (such as social security, insurance payments)	$ —	$	$ —	$
Unemployment payments	$ —	$	$ —	$
Public-assistance (such as welfare)	$ —	$	$ —	$
Other (specify): _____	$ —	$	$ —	$
Total monthly income:	$ 669.00	$	$ 669.00	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$
			$
			$

4. How much cash do you and your spouse have? $ 5 dollars

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
✓ DELUXE BANK IOWA	Checking	$ 36.00	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ 25% Rent	$
Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 100.00	$
Home maintenance (repairs and upkeep)	$ 10.00	$
Food	$ 200.00	$
Clothing	$ 20.00	$
Laundry and dry-cleaning	$ 20.00	$
Medical and dental expenses	$ 20.00	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 20.00	$
Recreation, entertainment, newspapers, magazines, etc.	$ 70.00	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$	$
Life	$ None	$
Health	$	$
Motor Vehicle	$	$
Other: _____	$	$
Taxes (not deducted from wages or included in mortgage payments) (specify): _____	$ None	$
Installment payments		
Motor Vehicle	$	$
Credit card(s)	$ None	$
Department store(s)	$	$
Other: _____	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$	$
Other (specify): _____	$	$
Total monthly expenses:	$ 819.00	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

BROKE

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: JAN 30, 2001

John Malestro

(Signature)

Supreme Court, U.S.
FILED
FEB 20 2001
OFFICE OF THE CLERK

(2)

No. 00-860

IN THE

Supreme Court of the United States

CORRECTIONAL SERVICES CORPORATION,
Petitioner,

v.

JOHN E. MALESKO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONER

Respondent's arguments in no way diminish the clear and acknowledged split in the courts of appeals. To the extent respondent's opposition addresses the merits, it only underscores the thorough development of the competing positions in the circuit courts and the need for an authoritative answer from this Court regarding the issue presented.

I. THERE IS A CLEAR AND ACKNOWLEDGED SPLIT AMONG THE COURTS OF APPEALS.

Respondent's contention that there is "substantial accord" among the circuits that *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), creates a cause of action against private entities acting under color of federal law—and that "[a]ll the circuits to face the question presented are in agreement that cases like this may proceed"—is flatly wrong. Opp. 4, 8. In fact, there is a clear, acknowledged, and irreconcilable split in the circuits concerning the question presented. Compare *Kauffman* v. *Anglo-American Sch. of Sofia*, 28 F.3d 1223, 1224, 1226-28 (D.C. Cir. 1994), with Pet. App. 5a-12a, and *Hammons* v. *Norfolk S. Corp.*, 156 F.3d 701, 704-08 (6th Cir. 1998); see also *Heinrich ex rel. Heinrich* v. *Sweet*, 62 F. Supp. 2d 282, 307-08 (D. Mass. 1999) (following *Hammons*).

1. There is a clear and acknowledged split of authority about the impact of *FDIC* v. *Meyer*, 510 U.S. 471 (1994), on extending a *Bivens* cause of action to private entities acting under color of federal law. Indeed, the Second Circuit below, in the most recent circuit opinion to address the issue, expressly acknowledged the split, stating that since *Meyer* "other circuits have . . . reached differing conclusions regarding [*Meyer*'s] impact." Pet. App. 7a. In particular, as the Second Circuit correctly recognized, the D.C. Circuit in *Kauffman* "held that *Meyer*'s reasoning preclude[s] *Bivens*

claims against private entities acting under color of federal law." *Id.* at 8a. "In contrast, the Sixth Circuit in *Hammons* . . . concluded that '[n]othing in *Meyer* prohibits a *Bivens* claim against a private corporation that engages in federal action,' and held that such claims should be allowed." *Id.* (quoting *Hammons*, 156 F.3d at 705). The Second Circuit found "the Sixth Circuit's analysis in *Hammons* persuasive and, substantially for the reasons articulated by that court, we hold that a private corporation acting under color of federal law may be sued under *Bivens*." *Id.* at 10a.

Likewise, before the Second Circuit's decision, the Sixth Circuit in *Hammons* acknowledged that it was creating a decisional conflict. The Sixth Circuit recognized that "*Kauffman* held that a *Bivens* action cannot be brought against private entities engaging in federal action." 156 F.3d at 703. The Sixth Circuit, by contrast, itself "h[e]ld that a *Bivens* claim can be brought against a private corporation that engages in federal action." *Id.* at 708. The split could hardly be more concrete or more clearly acknowledged by the circuits.

2. In *Kauffman*, the first post-*Meyer* circuit case to address the issue, the D.C. Circuit held that *Meyer* "is controll[ing]" and barred a *Bivens* action against "'a private and independent organisation,'" the Anglo-American School of Sofia. *Kauffman*, 28 F.3d at 1224. Nevertheless, respondent asserts that *Kauffman* does not really hold what the D.C. Circuit said it does: "However broadly the D.C. Circuit may have painted its holding, the facts of the cases are so different that the decisions [of the D.C., Second, and Sixth Circuits] cannot plausibly be said to conflict." Opp. 8.

Respondent attempts to cabin *Kauffman* as "factually unique, and easily distinguishable" because, he asserts, the entity there was "quasi-governmental" and essentially a government agency, like the entity at issue in *Meyer*. Opp. 7; see also Pet. 9 n.3 (describing entity in *Kauffman*).

Respondent's attempts to skirt the *Kauffman* decision are unavailing. First, the *Kauffman* court expressly stated that the entity in the case "*is not a federal agency*: it is plainly a different sort of entity than the . . . agency at issue in *Meyer*." *Kauffman*, 28 F.3d at 1226 (emphasis added). Moreover, even if one does not take the D.C. Circuit at its word, as noted in the petition for certiorari (Pet. 9 n.3)—yet ignored in respondent's opposition—in case there is any doubt about the legal standard that controls in that Circuit, the D.C. Circuit has further applied *Kauffman* to dismiss a *Bivens* claim against a private entity, the American Correctional Association ("ACA"), that has even fewer ties to government than did the entity in *Kauffman*. See *Bailey* v. *Illinois Freedom Militia S. Zone*, No. 98-5094, 1998 WL 545425, at *1 (D.C. Cir. July 17, 1998) (citing *Kauffman* and stating that "because ACA is not a federal actor . . . appellant's *Bivens* action cannot stand"). Indeed, in *Bailey*, the D.C. Circuit found the application of *Kauffman* to this private entity "so clear as to warrant summary action." *Id.* Accordingly, there can be no question about the rule of law in the D.C. Circuit.

Respondent may disagree with the merits of *Kauffman*'s analysis, but the D.C. Circuit's holding is clear, has been subsequently applied to an entity with even fewer ties to government, and results in a clear and acknowledged split with the Second and Sixth Circuits.

3. Furthermore, in light of *Meyer* and the above-described circuit split that arose in its wake, certain pre-*Meyer* circuit decisions that seemed to assume the availability of a *Bivens* cause of action hardly present "a long chain of precedent holding that a cause of action exists against private defendants acting under color of federal law." Opp. 5-6 (listing cases); see also Pet. 13-14 & n.5.

Even before *Meyer*, the links of this supposed "long chain of precedent" were suspect. As the D.C. Circuit explained, these cases "simply assumed without analysis that private *entities*

were no less susceptible to *Bivens* actions than private *individuals*." *Kauffman*, 28 F.3d at 1226. Moreover, "[e]ven before *Meyer*, other courts had rejected this assumption." *Id.* (citing *Shannon* v. *General Elec. Co.*, 812 F. Supp. 308, 323 (N.D.N.Y. 1993)).

But the Court need not linger on the merits of this point. More important for present purposes is the fact that the post-*Meyer* circuit split clearly continues with respect to the impact of *Meyer* on the vitality of these earlier cases. On the one hand, the Second Circuit was "not persuaded that the Supreme Court implicitly overruled this long line of cases in the *Meyer* opinion without making reference to any of them." Pet. App. 12a. Nor was the Sixth Circuit. *Hammons*, 156 F.3d at 708 (citing and "join[ing]" the pre-*Meyer* cases); see also *Heinrich*, 62 F. Supp. 2d at 308 (following *Hammons* and pre-*Meyer* circuit precedent "that appears to allow the use of *Bivens* against private entities"). By contrast, the D.C. Circuit held that the pre-*Meyer* cases assuming *Bivens* causes of action against private corporations "do[] not survive *Meyer*." *Kauffman*, 28 F.3d at 1226, 1228 & n.3.

For all of these reasons, there is an acknowledged and irreconcilable conflict among the circuits about whether a *Bivens* cause of action can be extended to private entities acting under color of federal law. Moreover, as is further evident from the remainder of this brief, the circuits already have had the opportunity to develop fully the competing arguments as to why such a cause of action is—or is not—appropriate. Accordingly, no further development among the circuits is necessary. Rather, there is a need for an authoritative resolution of this important question by this Court.

II. RESPONDENT'S REMAINING ARGUMENTS ADDRESS THE MERITS AND ONLY UNDERSCORE THAT THE COMPETING ANALYSES HAVE BEEN FULLY DEVELOPED BY THE CIRCUITS.

Respondent's remaining exposition of the merits of the circuit courts' competing analyses about whether to extend *Bivens* only emphasizes the depth and ripeness of the circuit split, the thoroughness of the development of the opposing legal analyses in those circuits, and the need for an answer from this Court.

1. Respondent's assertion that extending *Bivens* liability to private entities acting under color of federal law would not "take money from the public fisc, the integrity of which was an important consideration in *Kauffman*, *Meyer* and the decision below," Opp. 7-8, does not withstand scrutiny and only emphasizes the split of authority in the circuits. See also Pet. 12-13.

In *Meyer*, this Court unanimously rejected an invitation to extend a *Bivens* cause of action to federal agencies because one of the "'special factors counselling hesitation'" in extending *Bivens*'s reach was "creating a potentially enormous financial burden for the Federal Government." *Meyer*, 510 U.S. at 486 (quoting *Bivens*, 403 U.S. at 396). The Court left "it to Congress to weigh the implications of such a significant expansion of Government liability." *Id.* This reasoning applies with equal force to government contractors such as petitioner. As the Court recognized in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988): "It makes little sense to insulate the Government against financial liability . . . when the Government [provides the service] itself, but not when it contracts for the [service]." *Id.* at 512.

Indeed, the Court has recognized that government contractor liability places a direct strain on federal fiscal policy: "The imposition of liability on Government contractors will directly

affect the terms of Government contracts: either the contractor will decline to [do business with the federal government] or it will raise its price. Either way, the interests of the United States will be directly affected." *Id.* at 506. The Court further recognized that "[t]he financial burden of judgments against [government] contractors would ultimately be passed through, substantially if not totally, to the United States itself, since [government] contractors will predictably raise their prices to cover, or to insure against, contingent liability." *Id.* at 511-12.

Regardless of the merits of this point, however, there is a clear split among the circuits about whether extending *Bivens* liability to private entities would, in respondent's words, "create a financial threat to the federal government." Opp. 10. On the one hand, the D.C. Circuit explained that a "diversion of resources from a private entity created to advance federal interests has effects similar to those of [a] diversion of resources directly from the Treasury." *Kauffman*, 28 F.3d at 1227-28. Furthermore, if the private entity diverted funds for liability payments, "the government presumably w[ould] have to choose between allowing its interest to be served less well and spending more money to make up the shortfall—precisely the same choice that it would confront if *Bivens* actions could be brought against federal agencies." *Id.* at 1227.

By contrast, the Sixth Circuit rejected this analysis in that context because "[a]llowing a *Bivens* claim against a private corporation does not implicate 'federal fiscal policy,' where, as here, the federal purse is not involved." *Hammons*, 156 F.3d at 706. Similarly, the Second Circuit, while conceding that government contractors "might pass on the costs of *Bivens* liability to the government," nonetheless concluded that "we do not believe such liability has the type of direct impact on federal fiscal policy that the Supreme Court in *Meyer* was concerned would result from imposing *Bivens* liability directly upon federal agencies." Pet. App. 11a. In short, the circuits have fully developed the competing analyses

and an authoritative answer regarding the issue presented is needed.[1]

2. Respondent's argument that the government should not be permitted "to hire corporations to do what the government itself may not," Opp. 12, is inapposite because the fundamental teaching of *Meyer* is that a government agency is *not* subject to a *Bivens* suit. Accordingly, respondent is no worse off than if he wanted to sue a government agency, rather than a private entity acting under color of federal law.[2] That is, respondent has a cause of action against the individual wrongdoer under *Bivens*, but not against the entity.

In fact, it is respondent who seeks to have it both ways, asserting that: "[a] private entity that steps into the shoes of government" should be subject to a *Bivens* suit so as "not [to] erode constitutional protections against those acting under color of state law," but this entity should not be treated like a government agency under *Bivens*. Opp. 12. The Second and Sixth Circuits may agree. But the D.C. Circuit usefully reminds that *Bivens* plaintiffs "enjoy a constitutional claim

---

[1] Respondent engages in rank speculation in asserting that "CSC carries (per the Government's requirement) liability insurance" to cover its own potential *Bivens* liability. Opp. 11. But even assuming, *arguendo*, that this is correct, as shown above, *Boyle* recognizes that increased insurance costs imposed on government contractors directly impact the federal fisc. 487 U.S. at 506, 511-12.

[2] Moreover, as shown in the petition (Pet. 16), it is the Second and Sixth Circuits' approach that creates the anomalous result that prisoners in private federal facilities have an *additional* cause of action not available to those in public federal facilities. *Compare, e.g.*, Pet. App. 12a (permitting *Bivens* action against Petitioner CSC, a private corporation operating a correctional facility on behalf of BOP, despite *Meyer*), *with Tejeda* v. *Reno*, No. 00-CIV-6338 SAS, 2000 WL 1280969, at *3 (S.D.N.Y. Sept. 11, 2000) (following *Meyer* and prohibiting *Bivens* action against BOP and a federal penitentiary), *and Newman* v. *Holder*, 101 F. Supp. 2d 103, 107 (E.D.N.Y. 2000) (holding BOP "as an agency of the United States, is not a proper defendant in a *Bivens*-type action").

only to the extent that the [private actor's decision] can be analogized to the decision of a federal agency." *Kauffman*, 28 F.3d at 1226. Accordingly, "[w]e think it untenable to draw this analogy for purposes of *Bivens* but not for purposes of Meyer." *Id.*

3. Respondent suggests that certain "bolster[ing]" jurisprudence arising in the context of 42 U.S.C. § 1983 should be imported wholesale into the *Bivens* context. Opp. 11. There is a core distinction, however, between a cause of action created by Congress that contains express statutory parameters (Section 1983) and a judge-made cause of action created in the absence of any express remedy from Congress (*Bivens*). As evidenced in *Meyer*, the Court has been chary to expand *Bivens*—a judicially crafted action untethered to any statutory language and devoid of any guidance from Congress—to new contexts, let alone to entirely new categories of defendants. 510 U.S. at 484-86.

4. None of this impacts whether a plaintiff can bring a *Bivens* action against a proper *Bivens* defendant. Indeed, respondent assumes that ordinarily the wrongdoing individual acting under color of federal law is amenable to a *Bivens* suit. See Opp. 9.[3] While that issue is not before the Court, it is only because of respondent's failure timely to amend his complaint to name the wrongdoing individuals that he is left without this possible *Bivens* remedy. See *id.* at 3; Pet. App. 18a, 21a-24a.[4]

* * * *

---

[3] Moreover, respondent correctly acknowledges that additional remedies may be available under state tort law. Opp. 13.

[4] Respondent starkly asserts that petitioner "acknowledged that it would indemnify" its employees for their constitutional torts and that it is "unimaginable" that petitioner has not agreed to do so. Opp. 11. Respondent cites nothing in the record to support this bald claim, nor can he.

Declining to extend *Bivens* to private entities acting under color of federal law would not, as respondent contends, "strip . . . citizens of constitutional protections by placing them in the physical custody of private corporations" without proper remedies. Opp. 14. To the contrary, it would place citizens in precisely the same position they would be in if a government agency itself were providing the services in question. See Pet. 14-16 (explaining the anomalous results of the current split of authority); *supra*, n.2. In both cases, the *entity* would not be amenable to a *Bivens* suit. This interpretation satisfies the Court's unanimous recognition that "the purpose of *Bivens* is to deter *the officer*," while not improperly extending *Bivens* beyond its "logic[al]" limits. *Meyer*, 510 U.S. at 485, 486.

As aptly described by the D.C. Circuit, plaintiffs "enjoy a constitutional claim only to the extent that the [private actor's decision] can be analogized to the decision of a federal agency," that is, to the extent they are acting under color of federal law. *Kauffman*, 28 F.3d at 1226. "We think it untenable to draw this analogy for purposes of *Bivens* but not for purposes of *Meyer*." *Id.* The Second and Sixth Circuits, however, have squarely disagreed. The question presented has been thoroughly aired in the circuits and is primed for an authoritative answer from the Court. The Court should grant the petition to resolve this irreconcilable conflict in the circuits, at which point the merits of the conflicting positions can be fully briefed.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 00-860

SUPREME COURT, U.S.
FILED
MAY 17 2001
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IN THE

Supreme Court of the United States

CORRECTIONAL SERVICES CORPORATION,
Petitioner,

v.

JOHN E. MALESKO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 22, 2000
CERTIORARI GRANTED MARCH 5, 2001

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Appendix B

Memorandum Opinion and Order of the District Court, filed July 28, 1999 ..... 19a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Database (Foley Square)

Civil Docket For Case #: 97-CV-4080

JOHN E. MALESKO,

Plaintiff,

v.

CORRECTIONAL SERVICES CORPORATION,
Formerly Known as Esmor Correctional Services Inc.,

Defendant,

"JOHN DOE #1" TO "JOHN DOE #10", inclusive, the names of said John Doe Defendants are presently unknown but intended to indicate officers and managers and guards of the corporate defendant,

Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
6/4/97	2	COMPLAINT filed; (ba) [Entry date 06/10/97]
9/11/97	4	RETURN OF SERVICE executed as to Corr. Serv. Corp. by Debra Dawn' on 8/26/97 Answer due on 9/15/97 for Corr. Serv. Corp. (cd) [Entry date 09/15/97]
9/15/97	7	NOTICE OF MOTION by Corr. Serv. Corp. to dismiss the complaint (kw) [Entry date 09/17/97]
9/16/97	5	MOTION BRIEFING SCHEDULE/ ORDER, plaintiff's papers in opposition to the motion are due on 10/17/97; defendant's papers in reply are due on or before 10/28/97 (signed by Judge John S. Martin); Copies mailed (kw) [Entry date 09/17/97]

DATE	NO.	PROCEEDINGS
10/16/97	8	AFFIDAVIT in opposition of J. Malesko by John E. Malesko Re: [7-1] motion to dismiss the complaint (cd) [Entry date 10/20/97]
1/6/98	10	ORDER denying [7-1] motion to dismiss the complaint; Pltff alleges that while serving a sentence in a halfway house operated by deft, he suffered a heart attack as a result of having to climb stairs because he ws denied permission to use an elevator. Accepting these allegations as true, the complaint cannot be dismissed (signed by Judge John S. Martin); Copies mailed (djc) [Entry date 01/07/98] [Edit date 01/08/98]
4/16/98	12	ANSWER to Complaint by Corr. Serv. Corp. (Attorney Debra Dawn) (sac) [Entry date 04/20/98]
12/22/98	16	MEMORANDUM AND ORDER, extending the Scheduling Order as follows: any proposed expert witness must serve a report in strict compliance with Rule 26(a)(2)(B)—plaintiff's experts by 2/19/99, and defendant's experts by 3/12/99. All expert discovery must be commenced in time to be completed by 4/2/99. Permission to make any dispositive motions must be sought from Judge Martin by 4/9/99; if (and only if) no dispositive motions has been made, the joint pre-trial order, in a format that complies with the trial Judge's individual rules, must be filed by 4/30/99, and plaintiff must serve his sections of the pre-trial order by 4/16/99; none of these deadlines will be extended except upon a showing of good cause. Any request for an extension must be made, by fax and by mail, at least one week before the deadline in question, and must state the other party's position concerning a specific proposed alternative date; I will not "so order" any consent adjournment unless it complies with the preceding paragraph and tells me in writing the factual basis for the "good cause." (signed by Magistrate Judge Douglas F. Eaton); Copies mailed (ae) [Entry date 12/28/98]

DATE	NO.	PROCEEDINGS
12/24/98	18	Objection(s) by Corr Serv. Corp., to so much of the order entered by Mag. Judge Douglas F. Eaton on 12/18/98, which denied CSC leave to amend its answer and assert affirmative defenses (ls) [Entry date 12/30/98]
2/2/99	19	AMENDED COMPLAINT by John E. Malesko (Answer due 2/16/99 for "John Doe #1" to "John Doe #10", for Corr. Serv. Corp.) amending [2-1] complaint ; Summons issued. (sac) [Entry date 02/04/99]
2/10/99	20	MEMORANDUM of LAW by Corr. Serv. Corp. in support of [7-1] motion to dismiss the complaint. (ri) [Entry date 02/17/99]
2/10/99	21	NOTICE OF MOTION by Corr. Serv. Corp. for an order pursuant to Rule 12(b)(6) FRCP dismissing the amended complaint as to CSC; Return date 3/4/99 at 9:30am. (ri) [Entry date 02/18/99]

DATE	NO.	PROCEEDINGS
2/18/99	22	ORDER, plaintiff's response to motion reset to 3/15/99 for [21-1] motion for an order pursuant to Rule 12(b)(6) FRCP dismissing the amended complaint as to CSC; Reply to Response to Motion reset to 3/25/99 for [21-1] motion for an order pursuant to Rule 12(b)(6) FRCP dismissing the amended complaint as to CSC (signed by Judge John S. Martin); Copies mailed (djc) [Entry date 02/19/99]
3/17/99	24	NOTICE OF CROSS MOTION by John E. Malesko for an order, allowing pltf to Amend the Complaint in this action; Return date not indicated. (sac)
3/17/99	25	BRIEF by John E. Malesko re: in opposition to [21-1] motion for an order pursuant to Rule 12(b)(6) FRCP dismissing the amended complaint as to CSC; in support of [24-1] cross motion for an order, allowing pltf to Amend the Complaint in this action (sac)
3/17/99	26	DECLARATION of Steven Pasternak Re: in opposition to [21-1] motion for an order pursuant to Rule 12(b)(6) FRCP dismissing the amended complaint as to CSC; in support of [24-1] cross motion for an order, allowing pltf to Amend the Complaint in this action . (sac)
3/26/99	27	MEMORANDUM by Corr. Serv. Corp. in opposition to [24-1] cross motion for an order, allowing pltf to Amend the Complaint in this action (sac) [Entry date 03/30/99]

DATE	NO.	PROCEEDINGS
3/26/99	28	AFFIDAVIT in opposition of George F. Brenlla by Corr. Serv. Corp. Re: [24-1] cross motion for an order, allowing pltf to Amend the Complaint in this action (sac) [Entry date 03/30/99]
3/26/99	29	REPLY MEMORANDUM by Corr. Serv. Corp. re: in support of [21-1] motion for an order pursuant to Rule 12(b)(6) FRCP dismissing the amended complaint as to CSC (sac) [Entry date 03/30/99]
4/12/99	31	Filed Memo-Endorsement on letter to Judge Martin from George Brenlla, dated 4/9/99, all proceedings are stayed pending decision on the pending motions (signed by Judge John S. Martin) (cd) [Entry date 04/13/99]
4/14/99	32	REPLY MEMORANDUM by John E. Malesko re: [24-1] cross motion for an order, allowing pltf to Amend the Complaint in this action (cd) [Entry date 04/15/99]
4/26/99	33	DECLARATION by John E. Malesko in further support of [24-1] cross motion for an order, allowing pltff to amend the complaint in this action (sac) [Entry date 04/29/99]
7/28/99	34	MEMORANDUM OPINION and ORDER # 82632 denying [24-1] cross motion for an order, allowing pltf to Amend the Complaint in this action, The amended complaint is dismissed with prejudice; The Clerk of the Court is instructed to close this case (Signed by Judge John S. Martin); Copies mailed. (forwarded to the Judgment Clerk) (ri) [Entry date 07/29/99]

DATE	NO.	PROCEEDINGS
7/30/99	35	JUDGMENT, that for the reasons stated in the Court's Memornadum [sic] Opinion (82632) and Order dated 7/28/99, the amended complaint is dismissed with prejudice and the motion to file a second amended complaint is denied; accordingly, this case is closed (signed by James M Parkison, Clerk of Court); Mailed copies and notice of right to appeal. Entered on 8/2/99 (cd) [Entry date 08/02/99]
8/23/99	36	NOTICE OF APPEAL by John E. Malesko; from [35-1] judgment order, [34-1] order. The amended complaint is dismissed with prejudice, [34-2] order The Clerk of the Court is instructed to close this case, [34-3] order . Copies of notice of appeal mailed to Attorney(s) of Record: George F. Brenlla, Esq. $105.00 Appeal filing fee paid August 23, 1999 on receipt # E 352831. (dt) [Entry date 08/24/99]
8/24/99	—	Notice of appeal and certified copy of docket to USCA: [36-1] appeal by John E. Malesko; Copy of notice of appeal sent to District Judge. (dt)
11/1/00	38	Memo-Endorsement on letter addressed to Judge Martin from George P. Stasiuk, dated 10/30/00, all proceedings will be stayed pending the Supreme Court's action on the petition for certiorari (signed by Judge John S. Martin); Copies mailed. (cd)

DATE	NO.	PROCEEDINGS
11/1/00	39	MANDATE OF USCA (certified copy) Re: Order, Adjudged and decreed that the judgment is said district court be and it hereby is Affirmed in part, Vacated in part and Remanded to said district for further proceedings in accordance with the opinion of this Court. 99-7995, Roseann B. Mackechnie, Clerk. [36-1] appeal by John E. Malesko (sl) [Entry date 11/02/00]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Court of Appeals Docket #: 99-7995

JOHN E. MALESKO,
Plaintiff-Appellant,

v.

CORRECTIONAL SERVICES CORPORATION, formerly known as Esmor Correctional Services Inc. and "JOHN DOES #1 TO JOHN DOES #10", inclusive, the names of said John Doe Defendants are presently unknown but intended to indicate officers and managers and guards of the corporate defendant,

Defendants-Appellees.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
8/25/99	Copy of notice of appeal and district court docket entries on behalf of Appellant John E. Malesko filed. [99-7995] Form C due on 9/2/99. Form D due on 9/2/99. (cv77)
1/10/00	Appellant John E. Malesko joint appendix filed w/pfs. Number of volumes: 1. (cv77)
3/24/00	Appellant John E. Malesko supplemental appendix filed with proof of service. (ca91)
10/6/00	Judgment of the district court is AFFIRMED IN PART; VACATED & REMANDED IN PART by published signed opinion filed. (SS) [99-7995] (cv70)
10/6/00	Judgment filed. Date: 10/6/00] (cv70)
10/30/00	Judgment MANDATE ISSUED. (hh)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INDEX NO. 97 Civ. 4080 (JSM)(DFE)
JURY TRIAL DEMANDED
twelve persons

JOHN E. MALESKO,
Plaintiff,

-against-

CORRECTIONAL SERVICES CORPORATION Formerly Known As ESMOR CORRECTIONAL SERVICES, INC.; JORGE URENA, formerly JOHN DOE DEFENDANT #1; JOHN DOE #2 to JOHN DOES #10 INCLUSIVE, THE NAMES OF SAID JOHN DOE DEFENDANTS ARE PRESENTLY UNKNOWN BUT INTENDED TO INDICATE OFFICERS AND MANAGERS AND GUARDS OF THE CORPORATE DEFENDANT,

Defendants.

AMENDED COMPLAINT

Plaintiff John E. Malesko complaining of the defendants herein respectfully shows and otherwise alleges to this Honorable Court as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction and venue over the subject matter in that at the time of the incident:

(a) Plaintiff was a resident of the State of New Jersey.

(b) The Corporate Defendant is a corporation duly organized and existing pursuant to the laws of the State of Florida and maintains offices in the State of Florida.

(c) The John Doe #1 to John Doe #10 inclusive, upon information and belief, are either residents of the State of New York and/or the State of Florida.

(d) Defendant Jorge Urena, formerly identified as one of the John Doe Defendants, was an employee of the Corporate Defendant and the guard who ordered Plaintiff to use the steps, as opposed to the elevator (see below). Defendant Jorge Urena was upon information and belief a resident of the State of New York. Defendant Urena's current whereabouts are not known to either party.

(e) The incident complained of occurred within the jurisdiction of the United States District Court, Southern District of New York.

2. This action involves an amount of money in excess of $75,000.00.

3. The incident occurred at a halfway house operated by the Corporate Defendant on behalf of the United States Government Department of Justice Bureau of Prisons, wherein the Plaintiff was an inmate awaiting release under parole conditions.

BACKGROUND MATERIAL

4. On or about December 5, 1992, Plaintiff was convicted of certain infractions and sentenced to a Federal Institution where he was incarcerated.

5. On or about February 4, 1994, Plaintiff was assigned to a halfway house located at 15 E. 31st Street, New York, New York, which facility was operated by the Corporate Defendant as an independent contractor.

6. While Plaintiff was incarcerated in the United States Prison, he was diagnosed with a congestive heart failure condition.

7. The Plaintiff, from 1992 to February 1994, was treated by prison physicians and medication.

8. At the time that the Plaintiff was released to the halfway house, the records of the Plaintiff indicated that the Plaintiff was disabled and should use the elevators and not go up and down stairs.

COUNT ONE

9. Plaintiff repeats and reiterates each and every allegation set forth in Paragraphs enumerated herein as 1 to 8 with the same force and effect as though the same had been set forth at length herein.

10. Upon information and belief, the Plaintiff's records, including but not limited to Plaintiff's medical condition were sent to the Corporate Defendant at the time the Plaintiff was transferred from the United States Penal Institution operated by the Corporate Defendant through its Officers, Directors, Guards, Servants and Employees.

11. From February 4, 1994 to on or about March 25, 1994, Plaintiff was permitted to use the elevator to go from the lobby to the 5th floor.

12. On or about March 1, 1994, the Corporate Defendant through its Officers, Directors, Guards, Servants and/or Employees changed certain rules and regulations which among other things provided that all inmates residing from the first floor to the fifth floor, must use the staircase to their respective quarters and only inmates with quarters on the sixth floor or above, be permitted to use the elevators.

13. Notwithstanding the rules and regulations outlined in Paragraph 12 supra, the Plaintiff, due to his disability and infirmity, was permitted to use the elevator. (Plaintiff had his quarters on the fifth floor.)

14. On or about March 18, 1994, Plaintiff notified the defendants that Plaintiff's medication had run out and needed to be replenished.

15. On or about March 28, 1994, the Plaintiff was prevented from using the elevator going to the fifth floor and was directed by Jorge Urena, formerly identified as one of the John Doe Defendants, to use the staircase.

16. Plaintiff reminded Jorge Urena, formerly identified as one of the John Doe Defendants, of Plaintiff's infirmity and disability and that Plaintiffs record indicated that he should not use the staircase but be permitted to use the elevator.

17. Notwithstanding being reminded of Plaintiff's condition, Jorge Urena (formerly identified as one of the John Doe Defendants) compelled and otherwise forced Plaintiff against his will to attempt to climb the staircase to the fifth floor.

18. The Plaintiff suffered a severe heart attack. Plaintiff fell and injured his *left* ear.

19. The incident aggravated the prior existing condition and the injury to his *left* ear caused the Plaintiff to lose his equilibrium, thereby preventing the Plaintiff from obtaining and maintaining a job or position and compelling Plaintiff to live in abject poverty.

20. The Defendants were negligent in failing to obtain requisite medication for Plaintiff's condition and were further negligent by refusing the Plaintiff the use of the elevator.

21. As a result of the negligence of the Defendants, the Plaintiff was rendered, sick, sore, lame, bruised, contused and otherwise disabled, as well as seriously aggravating a previously existing condition.

22. Plaintiff has incurred the expenditure of large sums of money for his care for the aforesaid injuries and Plaintiff

verily believes that he will continue to incur expenditures of large sums of money in the future for his care and treatment.

23. Plaintiff verily believes that as a result of the injuries aforesaid will have to continue to live in object [sic] poverty for the rest of his life.

COUNT TWO

24. Plaintiff repeats and reiterates each and every allegation set forth in Paragraphs 1 to 8 and 10 to 23 inclusive with the same force and effect as though said allegations were set forth at length herein.

25. The actions of the Defendants in failing to provide elevator use violated Plaintiff's right of equal access as provided in Federal Statutes.

26. As a result of the Defendants' failure to provide equal access, the Plaintiff was caused to be injured, causing him to be rendered sick, sore, lame, bruised, contused and otherwise disabled as well as seriously aggravating a previously existing condition.

27. The actions of the Defendants in failing to replenish Plaintiff's medication and their refusal to permit Plaintiff to use the elevator and force him to use the staircase, knowing that it would seriously risk and otherwise impair the life and limb of the Plaintiff, was vindictive and malicious and violated the Plaintiff's constitutional and federal rights.

WHEREFORE, Plaintiff demands judgment in the sum of:

(a) $1,000,000 in compensatory damages;

(b) $3,000,000 in anticipated future damages;

(c) attorneys' fees, expert fees, and costs; and

(d) For such sum as the Court and/or Jury may determine as punitive damages.

PASTERNAK, FELDMAN &
PLUTNICK, P.A.
Attorneys for Plaintiff

Dated: February 1, 1999

/s/ Steven Pasternak
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MAY 17, 2001

(5)

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CORRECTIONAL SERVICES CORPORATION,
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Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

---

BRIEF OF PETITIONER

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May 17, 2001

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45 pp

QUESTION PRESENTED

Whether a cause of action for damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be implied against a private entity acting under color of federal law.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, the Petitioner states that it formerly was known as Esmor Correctional Services, Inc. The other parties in the proceedings below were Jorge Urena* and "'John Does #2 to John Does #10,' Inclusive, The Names Of Said John Doe Defendants Are Presently Unknown But Intended To Indicate Managers And Guards Of The Corporate Defendant."

Pursuant to Supreme Court Rule 29.6, Petitioner states that there are no parent companies, subsidiaries, and/or affiliates of Correctional Services Corp. that have issued shares to the public.

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* In his amended complaint, Respondent substituted Jorge Urena for "John Doe Defendant #1." Although the caption to the district court's Memorandum Opinion and Order of July 28, 1999 (Pet. App. 19a) bears this substitution, the caption in the court of appeals opinion (*id.* at 1a) does not.

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IN THE

Supreme Court of the United States

No. 00-860

CORRECTIONAL SERVICES CORPORATION,
Petitioner,

v.

JOHN E. MALESKO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals was entered on October 6, 2000, is reported at 229 F.3d 374 (2d Cir. 2000), and was reprinted in the Appendix to the Petition for Certiorari (Pet. App. 1a-18a). The memorandum opinion and order of the United States District Court for the Southern District of New York was entered on July 28, 1999, is unreported, and is reprinted in Pet. App. 19a-24a.

JURISDICTION

The court of appeals entered its decision on October 6, 2000. The petition for a writ of certiorari was filed on November 22, 2000, and was granted on March 5, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case does not involve the construction of a particular statutory or constitutional provision. Instead, the issue presented is whether the Court should extend to private entities the constitutionally inferred cause of action recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

STATEMENT OF THE CASE

This case concerns a correctional institution operated by a private entity on behalf of the Federal Bureau of Prisons ("BOP"). The ultimate responsibility to "provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States" is committed to the BOP, "under the direction of the Attorney General," 18 U.S.C. § 4042(a)(2). Acting pursuant to statutory authority,[1]

[1] The statutory authority for this practice is found in scattered sections of the United States Code. *See, e.g.*, 18 U.S.C. § 3621(b) ("The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government *or otherwise*. . . .") (emphasis added); *id.* § 4002 (permitting the Attorney General to contract with States, territories, and their political subdivisions to house and care for federal prisoners); *id.* § 4013(b) (stating procedure for contracting with private entities to house and care for federal detainees); *id.* § 4247(i) (permitting the Attorney General to contract with States, their political subdivisions, localities, and private entities to house and care for federal offenders with mental diseases or defects); *id.* § 5040 (permitting the Attorney General to contract with private and public entities and individuals to house and care for juvenile offenders); 42 U.S.C. § 13901 (permitting the Attorney General to contract with public and private entities to house and care for certain inmates and their families in community correctional facilities); Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, App. A, 113 Stat. 1501, 1501A-13 (1999) (authorizing and appropriating funds for the "Federal Prison System" to enter into contracts with private entities "for the confinement of Federal prisoners").

however, the BOP has entered into contracts with private entities, including Petitioner Correctional Services Corporation ("CSC"), for the housing, safekeeping, care, and subsistence of federal prisoners and detainees. Under a contract with BOP, and "on behalf of BOP," CSC operated Le Marquis Community Corrections Center, a halfway house located in New York. Pet. App. 2a.

Respondent John E. Malesko, having been convicted of federal securities fraud, was sentenced on December 3, 1992, to 18 months imprisonment under the supervision of the BOP. On February 2, 1994, Respondent was transferred by the BOP to Le Marquis for the remainder of his sentence.

According to Respondent's amended complaint, during his imprisonment he was diagnosed with a heart condition and was given a prescription for medication for that condition.[2] J.A. 10-11. CSC, "through its Officers, Directors, Guards, Servants and/or Employees" changed its elevator policy to prohibit inmates residing on the first through fifth floors of Le Marquis from using the elevator, but that CSC permitted him (a fifth-floor resident) to use the elevator because of his heart condition. *Id.* at 11. On March 28, 1994, however, a Le Marquis guard, Jorge Urena, allegedly required Respondent to use the stairs despite Respondent's protestation that he was specially permitted to use the elevator. *Id.* at 12. Respondent suffered a heart attack and fell while climbing the stairs to reach his fifth-floor room. Respondent argues that this injury was caused by the failure of unnamed persons to replenish his heart medication and by Officer Urena's denying him use of the elevator.

On March 27, 1997, Respondent filed a *pro se* complaint in the United States District Court for the Southern District of New York against CSC and ten "John Doe" defendants. On

[2] Because this appeal arises from an order dismissing the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), all allegations are accepted as true.

February 2, 1999, Respondent filed an amended complaint adding Officer Urena as a defendant. CSC moved to dismiss the amended complaint on February 10, 1999.[3]

The district court treated Respondent's amended complaint as raising *Bivens* claims. See Pet. App. 4a. On July 28, 1999, the district court granted CSC's motion to dismiss the amended complaint as to CSC "on two independent grounds: first, that Plaintiff cannot bring a *Bivens* action against a corporation; and, second, that CSC is immune to suit because it is a government contractor." *Id.* at 20a. Citing *FDIC* v. *Meyer*, 510 U.S. 471, 483-87 (1994), the district court reasoned that "[a] *Bivens* action may only be maintained against an individual," Pet. App. 20a, and thus, was not available against CSC, a corporation.

On appeal, the Second Circuit reversed the district court's dismissal of the claims against CSC. Agreeing with the Sixth Circuit's decision in *Hammons* v. *Norfolk Southern Corp.*, 156 F.3d 701 (6th Cir. 1998), and rejecting the D.C. Circuit's decision in *Kauffman* v. *Anglo-American School of Sofia*, 28 F.3d 1223 (D.C. Cir. 1994), the court of appeals concluded that private entities such as CSC are amenable to suit under *Bivens*. See Pet. App. 8a-10a, 12a.[4] The Second Circuit adopted this expansion to the category of *Bivens* defendants

[3] On March 17, 1999, Respondent filed a motion for leave to file a second amended complaint to name additional CSC employees as "Doe" defendants. Pet. App. 20a. The district court denied this proposed amendment as untimely, and thus, futile under Rule 15 of the Federal Rules of Civil Procedure. *Id.* at 21a-24a. The district court also ruled that the claim against Officer Urena, the individual defendant named in the first amended complaint, was time-barred. *Id.* at 24a. The Second Circuit affirmed these rulings. *Id.* at 18a. As a result, CSC is the only defendant remaining in the case. Accordingly, this case does not present the question of whether private individuals who are employed by a private entity may be liable under *Bivens*.

[4] The Second Circuit also rejected the district court's holding regarding the government contractor defense. Pet. App. 13a. CSC did not seek review of that decision.

despite its recognition that such actions against private entities may lack "a substantial deterrent effect," *id.* at 10a, and that "a private entity contracting to carry out governmental functions might pass on the costs of *Bivens* liability to the government," thereby affecting the federal fisc, *id.* at 11a. On November 22, 2000, CSC filed a petition for *certiorari*, which this Court granted on March 5, 2001.

SUMMARY OF ARGUMENT

The court of appeals decision below is premised on three analytical flaws. First, the court ignored the holding in *FDIC* v. *Meyer*, 510 U.S. 471 (1994), by extending the cause of action created in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to private entities "even absent a substantial deterrent effect," Pet. App. 10a. Second, the court failed to consider properly whether "special factors counsel[] hesitation," *Bivens*, 403 U.S. at 396, in creating a damages remedy against a new category of defendants where Congress has not acted. Third, the court of appeals improperly relied on 42 U.S.C. § 1983, to bolster its conclusion that extending the *Bivens* remedy is appropriate in this context. As shown below, an analysis free from these flaws compels the conclusion that extending *Bivens* liability to private entities is contrary to the logic of this Court's precedents embodied in *Bivens* and its progeny.

1. As this Court unanimously stated in *FDIC* v. *Meyer*, "the purpose of *Bivens* is to deter *the officer*." 510 U.S. at 485 (emphasis in original). Here, as in *Meyer*, extension of the *Bivens* remedy to entities will actually *undermine* the goal of deterring individual officers. *Id.* The court of appeals' contrary reasoning that expansion of *Bivens* in this context will still deter individual officers, see Pet. App. 11a, contradicts both common sense and this Court's express reasoning in *Meyer*, 510 U.S. at 485. As such, the decision below cannot stand, particularly in light of the fact that means exist by which a plaintiff in Respondent's position can sue for

compensatory damages or can seek to change an entity's policies.

2. As this Court emphasized in *Meyer*, extending the *Bivens* remedy "would be inappropriate *even if* such a remedy were consistent with *Bivens*" if special factors counsel hesitation. *Meyer*, 510 U.S. at 486 (emphasis supplied). Here, as in *Meyer*, extending liability to an entity serving the government interferes with federal fiscal decisionmaking. *Id.* at 486. In addition, the lower court's decision to extend *Bivens* liability to CSC, where the similarly situated BOP and FDIC are free from such liability, is illogical and inequitable and interferes with Congress's privatization policy. The policy issues raised by extension of *Bivens* in this context are ones that ought to be decided by Congress and, therefore, this Court should refuse to extend *Bivens* to private entities.

3. Unlike the appropriately narrow remedy created by this Court in *Bivens*, Section 1983 is a purposefully broad remedy created by Congress. Because Congress used its institutionally superior legislating powers to create its breadth, Section 1983 is irrelevant to the threshold question of whether courts should *create* a new *Bivens*-type remedy. Analogies to that statute, therefore, do not undermine the clear conclusion that judicially extending *Bivens* liability to private entities is inappropriate.

ARGUMENT

This Court's "recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended to new contexts." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). Indeed, in recent years, the Court has been presented with many requests to extend *Bivens* to new settings and to new classes of defendants, and has consistently declined these invitations. See *FDIC* v. *Meyer*, 510 U.S. 471 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); *United States* v. *Stanley*, 483 U.S. 669 (1987); *Bush* v. *Lucas*, 462 U.S. 367

(1983); *Chappell* v. *Wallace*, 462 U.S. 296 (1983). In this case, Respondent asks the Court to expand dramatically the category of defendants susceptible to a *Bivens* action to include private entities acting under color of federal law. That expansion, however, is contrary to the *Bivens* line of cases, as we demonstrate in detail herein.

This Court has *never* authorized a *Bivens* action against any entity or, indeed, against any defendant other than an individual federal officer. In its most recent *Bivens* decision, the Court unanimously held that an entity, specifically the Federal Deposit Insurance Corporation ("FDIC"), is not subject to *Bivens* actions largely because "the purpose of *Bivens* is to deter *the officer*," and that purpose is not served, and in fact is undermined, by authorizing *Bivens* actions against an entity. *Meyer*, 510 U.S. at 485 (emphasis in original). Moreover, even where a *Bivens* remedy might serve a deterrent purpose or arguably would provide a more effective remedy, it will not be allowed where "special factors counsel[] hesitation in the absence of affirmative action by Congress." *Id.* at 486; *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

Accordingly, in assessing whether to allow a *Bivens* action against a private entity such as CSC, a court must first determine whether such an extension would serve the core *Bivens* purposes of deterring individual federal officers from violating the Constitution *and* providing a remedy where none otherwise exists. *Meyer*, 510 U.S. at 473, 484-85. Second, and independent from these questions, the court considers whether there are "'special factors'" that counsel against the proposed extension. *Id.* at 486 (quoting *Bivens*, 403 U.S. at 396); *Chappell*, 462 U.S. at 298 ("Before a *Bivens* remedy may be fashioned, . . . a court must take into account any 'special factors counselling hesitation.'"). Both components must be satisfied before extending *Bivens* to a new context,

and because neither is satisfied here, we respectfully submit that private entities should not be subject to *Bivens* actions.[5]

I. THE PURPOSES OF *BIVENS* ARE NOT ADVANCED, AND WOULD BE UNDERMINED, BY ALLOWING *BIVENS* ACTIONS AGAINST PRIVATE ENTITIES.

The cause of action for damages created by the Court in *Bivens* is a narrow judicial solution crafted to fill a particular gap: the lack of *any* damages remedy for specified constitutional violations committed by individual federal officers. See *FDIC* v. *Meyer*, 510 U.S. 471, 485 (1994); *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 409-10 (1971) (Harlan, J., concurring).[6] In filling this gap, *Bivens* authorized damages

[5] The court of appeals and Respondent both rely on lower court cases decided prior to *Meyer*. *See* Resp. Pet. Opp. at 6 (citing cases); Pet. App. 6a, 12a. Most of these cases, however, did not squarely address whether *Bivens* could apply to private entities, but instead, focused exclusively on the private defendant's lack of federal action. *See, e.g.*, *Gerena* v. *Puerto Rico Legal Servs., Inc.*, 697 F.2d 447, 449 (1st Cir. 1983). To the extent these cases focused on the amenability question, they assumed without analysis that private individuals and entities were both subject to *Bivens* actions, *see, e.g.*, *Schowengerdt* v. *General Dynamics Corp.*, 823 F.2d 1328, 1337 (9th Cir. 1987), even though the arguments for individual and entity liability under *Bivens* are entirely distinct, *see Kauffman* v. *Anglo-American School of Sofia*, 28 F.3d 1223, 1226 (D.C. Cir. 1994). The pre-*Meyer* cases also failed to assess whether claims against private entities served the *Bivens* deterrent goal or to inquire whether special factors counseled hesitation. *See, e.g.*, *Yiammouyiannis* v. *Chemical Abstracts Serv.*, 521 F.2d 1392, 1393 (6th Cir. 1975). The pre-*Meyer* cases thus "do[] not survive *Meyer*." *Kauffman*, 28 F.3d at 1226.

[6] While the *Bivens* Court was responding in part to the then-narrow reach of the Federal Tort Claims Act ("FTCA"), the FTCA was "subsequently amended in light of *Bivens* to lift the bar against some . . . claims when arising from the act of federal law enforcement officers." *Butz* v. *Economou*, 438 U.S. 478, 504 n.31 (1978). In any event, in recent years, the Court has refused to extend *Bivens* even where the plaintiff lacks a fully effective alternative federal remedy. *See, e.g.*, *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988) ("[T]he absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation.").

suits against individual federal officers in order to serve a specific "purpose": "to deter *the officer*" by exposing him personally to the direct threat of litigation and liability if he uses his federal authority to act in an unconstitutional manner. *Meyer*, 510 U.S. at 485 (emphasis in the original) (citing *Carlson* v. *Green*, 446 U.S. 14, 21 (1980)). Accordingly, a *Bivens* action is appropriate only where it *both* provides damages for a constitutional violation that would otherwise lack *any* remedy *and* deters individual federal officers from committing constitutional violations. *Bivens* actions against private entities serve neither purpose and should not be allowed.

A. Extending *Bivens* To Private Entities Will Not Further, And Will Undermine, The Core *Bivens* Purpose Of Deterring Individual Officers.

Recently and unanimously, this Court made clear that the primary purpose of *Bivens* is to deter individual federal officers from committing constitutional violations. *Meyer*, 510 U.S. at 485. More specifically, the Court concluded that the fear of *Bivens* actions would dissuade individual federal officers from abusing their authority by subjecting them to a direct threat of litigation and liability for acting in a constitutionally proscribed manner.

When an individual federal officer is contemplating action, the threat of being personally sued under *Bivens* will affect his decisionmaking and deter him from engaging in unconstitutional acts. Indeed, "[i]t is almost axiomatic that the threat of damages has a deterrent effect . . . surely particularly so when the individual officer faces personal financial liability." *Carlson* v. *Green*, 446 U.S. 14, 21 (1980). Moreover, the pain of litigation—its many stresses,

embarrassments, and disruptions—is well known, and goes far beyond the threat of paying a lawyer or an adverse judgment. For example, this Court has recognized the intrusion of "broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues," that often attends litigation. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817 (1982). Accordingly, the prospect of personally enduring litigation encourages individuals acting under a cloak of federal authority to conduct themselves in a constitutionally appropriate manner.

This Court has made clear that an individual is deterred by the threat of litigation and liability even where he or she may have qualified immunity, is indemnified by the employing agency or entity, or is acting pursuant to an entity's policy. See, *e.g.*, *Meyer*, 510 U.S. at 473 (observing that the individual employee had qualified immunity);[7] *id.* at 474 (observing that the employee who terminated plaintiff was acting pursuant to an FDIC policy); *id.* at 486 (acknowledging the possibility of indemnification of officers for *Bivens* liability).[8] None of these circumstances, the Court has

[7] A CSC employee, unlike an FDIC employee, may not be entitled to qualified immunity, but may be entitled to raise a good faith defense. *See Richardson* v. *McKnight*, 521 U.S. 399, 412 (1997) (holding that qualified immunity is not available to private prison guards under 42 U.S.C. § 1983, although a good faith defense may be available); *see also* n.19, *infra* (discussing *Richardson*). Even so, if an individual federal officer *entitled* to qualified immunity protections is effectively deterred by the possibility of a *Bivens* action, as was the individual officer in *Meyer*, then a CSC guard working at a facility under a contract with the BOP who is *unsure* whether he is entitled to qualified immunity will be even more effectively deterred.

[8] In fact, the FDIC (and its statutory predecessor, the FSLIC), the federal entity at issue in *Meyer*, has had a policy of indemnifying its employees for constitutional torts since at least 1984. *See* 137 Cong. Rec. H1735-01, 1748 (daily ed. Mar. 13, 1991), *available at* 1991 WL 43750 (FDIC Statement of Policy and Plan for the Indemnification of Directors, Officers and Employees) (including indemnification for "all constitutional torts"). More generally, many federal entities have policies permitting the

determined, gives rise to individual indifference to the prospect of entanglement in litigation and potential liability.

Equally to the point, the Court has concluded that an individual will *not* be effectively deterred by the prospect that his or her employer may be subject to suit. This is the necessary premise of *Meyer* where the Court held that "the deterrent effects of the *Bivens* remedy would be lost" if the Court were to imply a damages remedy directly against the entity that employs the offending individual. 510 U.S. at 485. As the Court explained, "[i]f we were to imply a damages action directly against federal agencies . . . there would be no reason for aggrieved parties to bring damages actions against individual officers. . . . [T]he deterrent effects of the *Bivens* remedy would be lost." *Id.* This logic applies with equal force to Respondent's proposed *Bivens* action against a private entity:

> [O]n *Meyer*'s logic, provision of a damages remedy against a private entity would actively diminish the deterrent value of the remedy against the individual . . . . If such additional defendants were available (often with deeper pockets than the individual offenders), plaintiffs might make the same choice as the [plaintiffs here], who

indemnification of their employees for "any" suit in federal or state court arising from conduct falling within the scope of employment. *See*, *e.g.*, 13 C.F.R. § 114.110 (Small Business Administration); 14 C.F.R. § 1261.316 (National Aeronautics and Space Administration); 15 C.F.R. § 15.31 (Department of Commerce); 17 C.F.R. § 142.2 (Commodity Futures Trading Commission); 22 C.F.R. § 21.1 (Department of State); 22 C.F.R. § 207.01 (Agency for International Development); 24 C.F.R. § 18.1 (Department of Housing and Urban Development); 28 C.F.R. § 50.15(c) (Department of Justice); 34 C.F.R. § 60.1 (Department of Education); 43 C.F.R. § 22.6 (Department of the Interior); 45 C.F.R. § 36.1 (Department of Health and Human Services). Moreover, federal employees sued in their individual capacities for actions that reasonably appear to have been performed in the scope of their employment may be provided with representation by the Department of Justice. 28 C.F.R. § 50.15(a).

brought their *Bivens* actions only against the private entity and not against the individual board members.

Kauffman v. *Anglo-American Sch. of Sofia*, 28 F.3d 1223, 1227 (D.C. Cir. 1994); see also *AccuBanc Mortgage Corp.* v. *Drummonds*, 938 S.W.2d 135, 144-45 (Tex. Ct. App. 1996) (same).

Moreover, even if plaintiffs still sued individuals as well as entities, "they would likely focus collection efforts against the entity, with effects only partly blunted by the entity's rights to contribution" from the wrongdoing employee. *Kauffman*, 28 F.3d at 1227. Thus, like the proposed expansion of *Bivens* liability to the FDIC, the expansion of *Bivens* liability to private entities such as CSC would undermine the deterrence rationale of *Bivens*. And the Second Circuit's contrary assumption—that employers are better targets for *Bivens* liability than are employees, Pet. App. at 11a—has been specifically rejected by this Court, see *Meyer*, 510 U.S. at 484-86; *Carlson*, 446 U.S. at 21. See also *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 269-70 (1981) ("[A] damages remedy recoverable against individuals is *more effective* as a deterrent than the threat of damages against a government employer.") (citing *Carlson*) (emphasis supplied).[9]

Given that the purpose of *Bivens* is "to deter *the officer*," the proper "claim that the logic of *Bivens* supports" is a claim against the individual federal officer who allegedly violated the plaintiff's rights, not against the entity employing the wrongdoing individual. *Meyer*, 510 U.S. at 485; see also *id.* at 484 (observing that, in *Bivens*, the appropriate defendants

[9] Nevertheless, both the Second and Sixth Circuits were willing to disregard the Court's teaching about deterrence and extend a *Bivens*-type action against private entities "even absent a substantial deterrent effect," Pet. App. at 10a, and "regardless of whether future lawless conduct is deterred." *Hammons* v. *Norfolk S. Corp.*, 156 F.3d 701, 706 (6th Cir. 1998). This approach cannot be reconciled with the Court's *Bivens* jurisprudence and should be rejected.

were "the *agents* of the Federal Bureau of Narcotics who allegedly violated [plaintiff's] rights, not the Bureau itself") (emphasis added). *A fortiori*, the proper *Bivens* defendant is not an entity, be it private or public.[10]

B. Plaintiffs In Respondent's Shoes Have No Need For A *Bivens* Remedy Against Entities.

Unlike the plaintiff in *Bivens* who would have lacked any damages remedy for the alleged constitutional violations but for this Court's authorization of a cause of action against the FBI officers, 403 U.S. at 409-10 (Harlan, J., concurring),[11] Respondent had several substantial remedial options.

Respondent assumes—and the court of appeals appears to have agreed—that he could have brought a *Bivens*-type action against CSC's individual employees who allegedly acted unconstitutionally under color of federal law. See J.A. 9 (naming various individual CSC employees, including numerous "John Does" and Officer Urena as *Bivens* defendants).[12] While the Court has never decided whether individual employees of private entities acting under color of federal law are subject to *Bivens* actions, the weight of authority is that they are. See generally *Heinrich ex rel. Heinrich* v. *Sweet*, 62 F. Supp. 2d 282, 306-07 (D. Mass.

[10] While the *Bivens* vehicle only addresses wrongdoing by individuals, as shown in Section I.B., *infra*, a plaintiff has a variety of potential alternative means to recover damages from individuals or entities or to enjoin an entity's allegedly unconstitutional policies.

[11] Indeed, Respondent's numerous options stand in marked contrast to those available to the plaintiffs in *Bivens* and *Davis* v. *Passman*, 442 U.S. 228 (1979). Because the alleged wrongdoer in *Davis* was a United States Congressman, the *Davis* plaintiff had "no other alternative forms of judicial relief," *id.* at 245, "'no cause of action under [state] law,'" *id.* at 245 n.23, and no Title VII action "available," *id.* at 247 n.26. Indeed, the only available "remedy" for the plaintiff in *Davis* was a "voluntary" committee process with "no enforcement powers." *Id.* at 243 n.21.

[12] As discussed above, *see* n.4, *supra*, Respondent's attempt to name individual employees as defendants was time-barred.

1999) (collecting cases). And while future defendants should be permitted to argue that extending *Bivens* to these individuals is not warranted, the availability of such a claim has been assumed from the inception of this case. That being so, it is not logical for Respondent to argue that a *Bivens* action against the private entity should be inferred. As this Court explained, in the face of individual liability, institutional liability does not comport with the "logic" of *Bivens*:

> An additional problem with Meyer's "logic" argument is the fact that we implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available. In essence, Meyer asks us to imply a damages action based on a decision that presumed the *absence* of that very action.

Meyer, 510 U.S. at 485 (emphasis supplied).

In addition to recourse against the appropriate *Bivens* defendant, *i.e.*, the individual wrongdoing officer, plaintiffs in Respondent's position may have other judicially enforceable mechanisms for recovering compensation from wrongdoing officers and from entities. For example, plaintiffs in Respondent's position may have remedies under federal statutes. Here, for example, Respondent has asserted that he is entitled to recover under the Americans With Disabilities Act, 42 U.S.C. § 12131, *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. § 794. See Pet. App. 18a n.5 (noting that Respondent briefly raised these issues for the first time in his brief to the Second Circuit). The lower court did not address these claims.[13] Such congressionally created remedies could

[13] The Second Circuit declined to address the merits of Respondent's claims and permitted the district court to "consider the arguments on remand after the issue has been adequately briefed." Pet. App. 18 n.5. It would appear, however, that Respondent has waived these arguments by not pursuing them before the district court.

provide means both of compensating a plaintiff for injuries and of compelling an entity to change its policies.

Additionally, as Respondent also acknowledges, plaintiffs in his position have a remedy under state law. See Resp. Pet. Opp. 13 ("In every state, individuals may sue corporations for the torts they commit. In many states, including New York, private employers are liable for many of their employees' torts."). Respondent thus could have filed a tort claim against CSC or its employees.[14] There is nothing that remotely suggests that such a tort law remedy would have been inadequate to redress his claims.

Indeed, given the heightened "*deliberate* indifference to serious medical needs" standard of the Eighth Amendment,[15] *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976) (emphasis supplied), it likely would be *easier* for someone in Respondent's position to prevail under a state tort claim than under a constitutional tort theory. See *Daniels* v. *Williams*, 474 U.S. 327, 330, 331 (1986) (stating that while both the Due Process Clause and the Eighth Amendment require "deliberate" violations by officers, "merely negligent conduct" involving lack of due care by prison officials is suitable for state tort relief) (citing *Estelle*); *id.* at 332 ("Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant

[14] Although Count I of Respondent's Amended Complaint arguably alleged a negligence claim, *see* J.A. 11-13, Respondent never sought any relief on any ground other than *Bivens*. Moreover, both the district court and the Second Circuit treated this case as raising only *Bivens* claims. *See* Pet. App. 4a, 20a-21a. Accordingly, any tort claim respondent may have had was abandoned long ago and is therefore forfeited.

[15] While neither court below reached the question of which constitutional provision Respondent's putative *Bivens* claim arose under (and Respondent did not so specify in his amended complaint), it appears that Respondent attempted to raise a claim of "deliberate indifference . . . to a prisoner's serious illness or injury" under the Cruel and Unusual Punishments Clause of the Eighth Amendment. *Estelle* v. *Gamble*, 429 U.S. 97, 104-05 (1976).

traditional tort law."); see also *Hudson* v. *McMillian*, 503 U.S. 1, 9 (1992) (noting that, even when malevolent touching is alleged, "'[n]ot every push or shove [by an officer], even if it may later seem unnecessary . . . , violates a prisoner's constitutional rights'") (quoting *Johnson* v. *Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). In *Bivens*, by contrast, in the search and seizure context, state law remedies were feared to offer a narrower remedy to an aggrieved plaintiff than would the Fourth Amendment in the circumstances presented. 403 U.S. at 393-94. Here, there is no indication that Respondent was precluded from bringing a state law claim against CSC or its employees or that such a tort claim would be insufficient to provide compensation for any injury.

Accordingly, Respondent's situation stands in sharp contrast to cases where this Court has applied the *Bivens* remedy. Cf. *id.* at 409-10 (Harlan, J., concurring) ("For people in Bivens' shoes it is damages [against the individual officer] or nothing."); *Davis* v. *Passman*, 442 U.S. 228, 243 n.21, 245 (1979) ("For Davis, as for Bivens, it is damages or nothing"; no remedy other than an unenforceable "voluntary" committee process). Malesko—unlike Bivens—is not a plaintiff in search of a remedy. Plaintiffs in "Malesko's shoes" may obtain redress for harms suffered without the unprecedented and substantial extension of *Bivens* sought by Respondent.

Moreover, in addition to these remedies, people in Respondent's position also may have administrative and injunctive vehicles through which to address their complaints against both individual officers and entities. First, administrative remedies may be available to address an individual officer's conduct or an entity's policies. For example, the BOP's Administrative Remedy Program ("Program"), provides "a process through which inmates may seek formal review of an issue which relates to *any aspect* of

their confinement." 28 C.F.R. § 542.10 (emphasis added).[16] Second, a plaintiff seeking to challenge an entity's policy as being unconstitutional may seek injunctive relief pursuant to 28 U.S.C. § 1331, to change that policy. Unlike the *Bivens* remedy, which has never been the proper vehicle through which to alter an entity's policy, see Section I.A., injunctive relief has long been recognized as a proper means through which to prevent an entity from acting unconstitutionally. Injunctive relief, unlike the *Bivens* remedy, is well-tailored to

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[16] The Program applies to all "inmates designated to contract Community Corrections Centers (CCCs) under Bureau of Prisons' responsibility." 28 C.F.R. § 542.10; *see also* Pet. App. 2a (describing Le Marquis, the halfway house to which Respondent was assigned by BOP, as a "Community Corrections Center"). Moreover, "[i]nmates in CCCs are not required to attempt informal resolution" before utilizing the Program. 28 C.F.R. § 542.13. The Community Corrections Manager, Warden, Regional Director, and General Counsel are charged with "implementation and operation" of the Program at CCCs and "shall": "[e]stablish procedures for receiving, recording, reviewing, investigating, and responding" to inmate requests and appeals; "[a]cknowledge" receipt of an inmate's request or appeal; "[c]onduct an investigation" into each request or appeal; and "[r]espond" to all requests and appeals. *Id.* § 542.11. In the case of "*[s]ensitive issues*," an aggrieved inmate may submit a request directly to a regional director outside of the institution in which the inmate is housed. *Id.* § 542.14(d). In addition, appeals, *id.* § 542.15, and assistance, *id.* § 542.16, are available.

The Program provides an additional means through which allegedly unconstitutional actions and policies can be brought to the attention of both CCC management and the BOP and be prevented in the future. *See Farmer* v. *Brennan*, 511 U.S. 825, 847 (1994) ("[A]n inmate would be well advised to take advantage of internal prison procedures for resolving inmate grievances."). Although claims that are covered by other administrative procedures (such as tort claims under the FTCA), 28 C.F.R. § 542.12(b), are excluded from the Program, constitutional claims recognized under *Bivens* are included. *See* 42 U.S.C. § 1997e(a) (1996) (creating mandatory requirement that prisoners exhaust administrative remedies), *superseding McCarthy* v. *Madigan*, 503 U.S. 140, 142 n.2, 152 (1992) (holding that a prisoner need not exhaust administrative remedies under the Program before bringing a *Bivens* claim against individual federal officers where "Congress has not *required* exhaustion").

the goal of preventing entities from engaging in unconstitutional behavior. Finally, in addition to these alternatives, the BOP has several means to check the behavior of a private correctional provider including vigorous oversight and refusing to extend the contract with a wrongdoing corporation.

* * * * *

Like the plaintiff in *Meyer*, Respondent seeks a dramatic extension of *Bivens* but that extension would not advance—and would indeed undermine—the core *Bivens* purpose of deterring individual officers from engaging in unconstitutional wrongdoing. Nor is the proposed extension necessary to remedy constitutional violations against those in Respondent's position. For these reasons alone, this Court should reverse the Second Circuit's impermissible expansion of the category of *Bivens* defendants to include private entities.

II. SPECIAL FACTORS COUNSEL AGAINST EXTENDING *BIVENS* TO PRIVATE ENTITIES.

Even if extending *Bivens* liability to private entities in this context would further the deterrence and compensation goals of *Bivens*—which it would not—extension is nonetheless inappropriate because special factors counsel against it. See *FDIC* v. *Meyer*, 510 U.S. 471, 486 (1994) (holding unanimously that, where special factors are present, a *Bivens* remedy is "inappropriate even if such a remedy is consistent with *Bivens*"). Special factors present in this case make it plain that extending *Bivens* in this context would be unwise and inappropriate.

In determining whether there are "special factors" in a given case, "the range of policy considerations [the Court] may take into account is at least as broad as the range of those a legislature would consider." *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring). Thus, the "*Bivens* line[] of cases reflects a sensitivity to varying contexts. . . . The range of

concerns to be considered in answering this inquiry is broad." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 280 (1997) (Kennedy, J., opinion) (citation omitted) (comparing the case-by-case analyses required under *Bivens* and *Ex parte Young*, 209 U.S. 123 (1908)). Of particular import in this inquiry is "whether the courts are qualified to handle the types of questions raised by the plaintiff's claim." *Butz* v. *Economou*, 438 U.S. 478, 503 (1978). Sensitive to the varying institutional abilities of different branches of the Federal Government, see *Bush* v. *Lucas*, 462 U.S. 367, 389 (1987), this Court has been reluctant to resolve questions that lie within the institutional competence of Congress or to interfere with determinations that Congress already has made. See, *e.g.*, *id.*, at 380 (stating that the prudential "special factors" speak not to "the merits" of the proposed remedy but rather "to the question of who should decide whether such a remedy should be provided").

In conducting the "special factors" analysis, the Court first considers "how harmful and inappropriate judicial intrusion upon [the subject matter] is thought to be. This is essentially a policy judgment, and there is no scientific or analytic demonstration of the right answer." *United States* v. *Stanley*, 483 U.S. 669, 681 (1987). Second, the Court makes an "analytic" judgment about "the degree of disruption [a *Bivens* action] will in fact produce" if extended to a given context. *Id.* In making these assessments, "it is irrelevant . . . whether the laws currently on the books afford [a potential plaintiff] an 'adequate' federal remedy for his injuries." *Id.* at 683.

Under these principles, several "special factors" counsel against authorizing *Bivens* actions against private entities, and specifically private correctional providers. To prevent interference with federal fiscal decisionmaking, to maintain equitable treatment of public and private entities acting under color of federal law, and to avoid interference with Congress's interest in privatization, this Court should reject the proposed expansion of *Bivens* liability to private entities

and leave such extension to Congress's informed judgment. Whether considered separately or "[t]aken together," *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983), these special factors demonstrate that an extension of *Bivens* is inappropriate in this context.

A. Extending *Bivens* Liability To Private Governmental Contractors Threatens Federal Fiscal Policy And The Federal Fisc.

This Court has previously recognized that a primary factor weighing against judicial expansion of *Bivens* is the extent to which that expansion would interfere with or have a detrimental impact on "federal fiscal policy." *Meyer*, 510 U.S. at 486; *Bivens*, 403 U.S. at 396. Pertinent here, this Court has refused to extend *Bivens* liability where such an extension could require the expenditure of federal funds or otherwise significantly affect federal fiscal decisionmaking. *Meyer*, 510 U.S. at 486. In *Meyer*, for example, the Court held that because permitting a direct action against a government corporation could "creat[e] a potentially enormous financial burden for the Federal Government," imposition of liability against such defendants was "inappropriate even if such a remedy were consistent with *Bivens*." *Id.*

This limiting principle also applies to Respondent's attempts to extend *Bivens* liability to private entities, such as CSC, that contract with and act on behalf of the Federal Government. This Court has recognized that "[t]he financial burden of judgments against the [government] contractors would ultimately be passed through, substantially if not totally, to the United States itself, since . . . contractors will predictably raise their prices to cover, or to insure against, contingent liability." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 511-12 (1988) (creating the government contractor defense). The analysis in *Boyle* accords well with common sense and with economic realities. As Respondent acknowledges, CSC (like other private government contractors) is a

profit-making entity. See Resp. Pet. Opp. at 1, 5, 7, 13. *Boyle* reflects the fact that profit-making entities will seek to avoid absorbing costs by passing on those costs to end users (here, the Federal Government)—particularly where, as here, all other competitors will be likewise subject to the same risk of liability. This is singularly likely for industries, such as prison management, where the government is the only purchaser of the services in question.

Indeed, the Second Circuit acknowledged that "a private entity contracting to carry out governmental functions might pass on the costs of *Bivens* liability to the government." Pet. App. 11a. While the Second Circuit glossed over this threat to the federal fisc on the ground that it was not sufficiently "direct," *id.*, *Boyle* is unquestionably correct in stating that an *indirect* attack on the fisc is a threat nonetheless. Indeed, while assessing liability against a government contractor may not "directly" remove money from the Treasury, it will lead to either the unavailability of government contractors or higher prices for the Government: "Either way, the interests of the United States will be *directly* affected." *Boyle*, 487 U.S. at 507 (emphasis supplied).[17]

Respondent has erroneously suggested that federal monies will not be at risk if *Bivens* liability is extended to private entities because insurance policies will cover the liability. See Resp. Pet. Opp. at 11. As this Court in *Boyle* recognized, however, private contractors will pass on to the government *either* the increased contingent liability *or* the increased cost

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[17] In addressing this question the D.C. Circuit correctly recognized that extending *Bivens* liability to private entities would constitute a threat to the federal fisc because "diversion of resources from a private entity created to advance federal interests has effects similar to those of diversion of resources directly from the Treasury." *Kauffman* v. *Anglo-American Sch. of Sofia*, 28 F.3d 1223, 1227-28 (D.C. Cir. 1994). This is because the diversion of resources will require the Federal Government to make a choice between either providing more funds to the entity or risking that its interests will suffer due to inadequate funding. *Id.*

of insuring against that liability. 487 U.S. at 511-12. Because extending *Bivens* liability to private entities will increase the risk of loss, it follows inevitably that a private entity subject to *Bivens* liability would be required by an insurance company to pay higher premiums to cover that higher risk.[18] Additionally, to the extent that liability exceeds the amount covered by such an entity's insurance policy, that liability would be passed along to the Federal Government.

If *Bivens* were extended to private entities acting on behalf of the Federal Government, there is little that those entities could do to eliminate their exposure to liability, and thus, to avoid passing along their increased costs to the Federal Government. For example, in the instant context, the nature of prison management would make *Bivens* lawsuits unavoidable, and imposing *Bivens* liability in this new context would inevitably lead to higher costs to the Federal Government. Indeed, it is no answer to assert that all a private correctional provider need do to avoid *Bivens* liability is to act in a constitutionally consistent manner. "The administration of a prison is a difficult undertaking at best, for it concerns persons many of whom have demonstrated a proclivity for antisocial, criminal, and violent behavior." *Cleavinger* v. *Saxner*, 474 U.S. 193, 203 (1985); cf. *Shaw* v. *Murphy*, __ U.S. __, No. 99-1613, 2001 WL 387410, at **4 (Apr. 18,

[18] Risk is "the basis of the computation of a premium that an insured pays to the insurer to acquire insurance." Keeton & Widiss, *Insurance Law* § 1.3(a) n.1 (1988). "[I]f two purchasers of insurance coverage have different predicted losses or actual loss experiences, it is easy to conclude that the prices that each pay should reflect those differences." Kenneth S. Abraham, *Efficiency and Fairness in Insurance Risk Classification*, 71 Va. L. Rev. 403, 404 (1985). Indeed, if an entire group of insureds is subject to a given risk, an insurance company may choose to classify it as a single group for premium pricing purposes, in order to spread the risk among that group. *Id.* Thus, if the entire group of private correctional providers is subject to *Bivens* liability, a particular provider which takes extra steps to avoid *Bivens* liability may still be subject to higher insurance premiums. Accordingly, all contractors would pass along the increased costs to the Federal Government, thereby impacting federal fiscal policy.

2001) (discussing deference given to prison officials' policies).[19] Even worse, "[t]he number of nonmeritorious prisoners' cases" filed, *Cleavinger*, 474 U.S. at 203, will only be exacerbated by the availability of a "deep pocket" corporation as an attractive litigation target, *Kauffman* v. *Anglo-American School of Sofia*, 28 F.3d 1223, 1227 (D.C. Cir. 1994).

If subjected to *Bivens* liability, any private correctional provider—even one acting in good faith—would be targeted for numerous, often nonmeritorious lawsuits and would pass the resulting costs of litigation and liability on to the Federal Government. This Court should "leave it to Congress to weigh the implications of such a significant expansion of Government liability." *Meyer*, 510 U.S. at 486.

B. Extending Liability To Private Entities Is Illogical And Inequitable And Would Undermine Congressional Privatization Policy.

Because of recent congressional policy permitting privatization of certain governmental functions, a new breed of government contractor has arisen: entities that do not

[19] This discretion inherently increases the risk of lawsuits, particularly given that, as the very existence of the qualified immunity defense acknowledges, there are situations in which a government actor may seek to act constitutionally but fail because the constitutional right is not one that is "clearly established." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-18 (1982). While the Court has not addressed this question in terms of private prison guards under *Bivens*, the Court has held that qualified immunity is not available to private prison guards under Section 1983. *See Richardson* v. *McKnight*, 521 U.S. 399, 412 (1997). *Richardson* based its conclusion largely on a historical analysis, but also concluded that the likelihood that private correctional facilities have insurance covering the guards' actions reduces the risks that a prison guard might not do an effective job or eschew such employment absent qualified immunity. *Id.* at 410-11. This analysis did not consider the risk that the increased liability may raise insurance premiums or necessitate the purchase of additional insurance, because it was assessing the effect of both insurance and liability on private prison guards, not on the corporations who actually pay for insurance. These considerations are highly relevant here.

merely *assist* an agency with an aspect of its mission, but instead, actually *perform* the mission. A plaintiff may not logically assert that a private entity performing such a governmental mission should be subject to *Bivens* because it is analogous to a federal entity and yet maintain that the private entity, unlike its federal counterpart, may incur *Bivens* liability. See *Kauffman*, 28 F.3d at 1226 (It is "untenable to draw this analogy [between a federal agency and a private entity] for purposes of *Bivens* but not for purposes of *Meyer*."). *Kauffman*'s logic accords well with common sense, but also with the principle of equity: Similarly situated entities should receive identical treatment under the law.

In this case, CSC is being sued because it is performing the BOP mission. As such, it effectively stands in the shoes of the BOP and, like the BOP, should not be amenable to *Bivens* suits. Moreover, CSC also shares a remarkably similar legal nature to the FDIC, the entity held in *Meyer* not to be answerable to *Bivens* suits. The Second Circuit's incongruent treatment of CSC as compared to the BOP and the FDIC, thus, is both illogical and inequitable and, therefore, should be rejected. Just as importantly, upholding this incongruent treatment of private entities, as compared to their counterpart public entities, would interfere with express congressional policies regarding privatization. Accordingly, this Court should refuse to extend *Bivens* to private entities.

1. CSC And The BOP Serve The Same Basic Function: Confinement Of Inmates.

Respondent's theory of liability rests on the basic principle that CSC performs the same public function as does the BOP. Cf. *Kauffman*, 28 F.3d at 1226. That is, Respondent seeks to make CSC amenable to *Bivens* suit on the ground that CSC is acting sufficiently like the Federal Government to be acting under color of federal law. Indeed, the duties that he alleges that CSC employees violated are duties that Congress has committed to the BOP: namely, to provide "for the safe-keeping, care, and subsistence of all persons charged with or

convicted of offenses against the United States." 18 U.S.C. § 4042(a)(2); see also *id.* § 4006 (discussing subsistence for prisoners, including health care items and services).

As an entity engaged in the precise activities as the BOP, albeit with contractual limitations and BOP oversight, CSC should be subject to the same exposure to *Bivens* liability as is the BOP. Under the decision below, however, private correctional providers, such as CSC, may be liable under *Bivens*, while the BOP—the entity with ultimate statutory responsibility for prison inmates—is free from such liability. See, *e.g.*, *Howard* v. *Federal Bureau of Prisons*, 198 F.3d 236, No. 99-6708, 1999 WL 798883, at **1 (4th Cir. Oct. 7, 1999) (per curiam) (unpublished table decision) (concluding that *Bivens* action could not be brought against the BOP); *Tejeda* v. *Reno*, No. 00-CIV-6338 SAS, 2000 WL 1280969, at *3 (S.D.N.Y. Sept. 11, 2000) (same); *Newman* v. *Holder*, 101 F. Supp. 2d 103, 107 (E.D.N.Y. 2000) (same).

Indeed, "the differences between a federal agency and an artificial person that is a federal actor seem to weaken, rather than strengthen, the case for a *Bivens* remedy." *Kauffman*, 28 F.3d at 1226. Under *Meyer*, if the private entity-defendant actually *were* a federal agency, a *Bivens* action would only lie against its individual employees, not against the entity itself. "That the [private entity]'s link to federal authority is more tenuous does not make a *Bivens* remedy against it any more appropriate." *Id.*[20] This Court should reverse the decision

[20] The prospect of extending *Bivens* to any private party itself counsels hesitation. *See generally Zerilli* v. *Evening News Ass'n*, 628 F.2d 217, 224 (D.C. Cir. 1980) (stating that the fact that a claim is against a private party "should at least 'counsel hesitation' in the creation of *Bivens* liability"); *Fletcher* v. *Rhode Island Hosp. Trust Nat'l Bank*, 496 F.2d 927, 932 n.8 (1st Cir. 1974) ("[T]here is no [*Bivens*] cause of action against private parties acting under color of federal law or custom."). The core, paradigm *Bivens* claim is one against an *individual federal officer*. *See FDIC* v. *Meyer*, 510 U.S. 471, 485 (1994); *Carlson* v. *Green*, 446 U.S. 14, 21 (1980); *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). Indeed, the Court has *never*

below, which causes this illogical and inequitable difference in treatment between the BOP and private correctional providers.[21]

2. CSC Shares Critical Attributes With The FDIC And Other Government Corporations.

It is likewise illogical and inequitable to treat CSC and the FDIC differently in terms of their amenability to *Bivens* liability. In fact, private contractors, such as CSC, are strikingly similar to federal government corporations, such as the FDIC, in several critical ways. First, both private contractors and federal government corporations have legal personalities separate from the Federal Government. See A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. Ill. L. Rev. 543, 552 (defining federal government corporations as "separate legal persons chartered directly by an act of Congress or by persons acting pursuant to congressional authorization"); Buel White et al., *Budget Limitations Spur Privatizations*, Nat'l L. J., May 27, 1996, at B7 ("Government corporations typically are structured as stand-alone corporate bodies.").[22] Second, as with CSC, it is

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recognized a *Bivens* remedy against *anyone* other than an individual federal officer. As a claim extends from that core, *e.g.*, to private entities, a court should be more reluctant to expand *Bivens* liability. *See, supra*, Section I.A; *cf. Kauffman*, 28 F.3d at 1226.

[21] A different issue of equity is raised by the possibility that otherwise similarly situated federal prisoners currently may have different remedies for similar mistreatment depending solely on the kinds of facility (federal, state, municipal, or private) to which the Federal Government chooses to commit them. *Cf. McCall* v. *Swain*, 510 F.2d 167, 182 (D.C. Cir. 1975) (asserting that disparate access to courts for prisoners based solely on the Attorney General's commitment orders "would likely constitute a denial of equal protection").

[22] Indeed, "the United States is not legally responsible for the debts of even a wholly owned [federal government corporation] unless there is a constitutional, statutory, or federal common-law rule to the contrary." A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. Ill. L. Rev. 543, 553.

not necessary for the Federal Government to own all, or even any, of the FDIC's equity.[23] Like CSC, the FDIC gets a portion of its funding from nonfederal sources and, in some years, its nonfederal collections exceed its gross outlays. United States GAO, *Government Corporations: A Profile of Existing Government Corporations* 69 (Dec. 1995). Thus, much of the money in the FDIC's coffers at any given time does not come from the federal budget, but from assessments from insured banks. Third, like private corporations (including CSC), the FDIC can "sue and be sued." 12 U.S.C. § 1819(a). As *Meyer* noted, the FDIC's "sue-and-be-sued clause 'fully waived'" sovereign immunity. 510 U.S. at 483 (quoting *Franchise Tax Bd.* v. *Postal Serv.*, 467 U.S. 512, 520 (1984)). *Meyer* gave government corporations, such as the FDIC, the same exemption from *Bivens* liability granted to government agencies. A private corporation, such as CSC, which is fulfilling a public mission on behalf of the Federal Government and shares key characteristics relevant to both suability and accountability, should receive the same treatment under *Meyer* as does the FDIC.[24]

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[23] As a mixed-ownership corporation, *see* 31 U.S.C. § 9101(2); United States GAO, *Government Corporations: A Profile of Existing Government Corporations* 68 (Dec. 1995), "the United States may own some or none of the [FDIC's] equity." Froomkin, *supra*, at 555. As originally constituted, the FDIC was owned in part by the banks that it insured and is now funded by assessments from insured banks. *See* Banking Act of 1933, ch. 89, sec. 8, § 12A, 48 Stat. 162, 168-72 (creating FDIC and describing stock ownership); *see also* Federal Deposit Insurance Act, ch. 967, sec. 2, § 7, 64 Stat. 873, 876-79 (1950) (recodifying Federal Deposit Insurance Act and instituting assessment system).

[24] In fact, at least one commentator argues that government corporations are subject to *less* accountability than are *either* government agencies *or* private corporations:

> [A]n FGC's [federal government corporation] liberty to abuse its powers faces fewer practical or even theoretical constraints than comparable institutions. Because FGCs are federal, they are not subject to regulation by the states. Because they are governmental, and often have special powers or access to cheaper capital, they are

3. Extending *Bivens* Liability To Private Entities Would Interfere With Congressional Policy Regarding Privatization.

A judicial authorization of *Bivens* actions against private entities would undermine Congress's stated policy in favor of privatization. That consideration also counsels hesitation in extending *Bivens* to this context.

Indeed, Congress has enacted many statutory provisions permitting[25] and encouraging[26] federal agencies to work with

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largely immune from market forces. Because they are corporations, they are exempt from most constraints ordinarily applied to federal agencies. . . .

. . . Ordinary state-chartered corporations exist to further privately selected goals, often the quest for private profit. Their liberty to abuse their powers is curbed by market forces and by public and private laws enacted by both the state and federal governments. Ordinary federal agencies are established to further publicly selected goals, defined, in at least a general fashion, by Congress and the President. The federal agencies' liberty to abuse their powers is curbed by political forces, federal statutes, and the Constitution. In practice, neither public nor private accountability mechanisms are necessarily effective when applied to many FGCs.

Froomkin, *supra*, at 560 (footnote omitted).

[25] *See, e.g.*, 8 U.S.C. § 1522(b)(1)(A)(ii) (permitting Director of Immigration and Naturalization Service to contract with "public or private nonprofit agencies" for initial resettlement of refugees); 10 U.S.C. § 2462(a) (permitting Secretary of Defense to use private contractors for Department of Defense functions "other than functions which the Secretary of Defense determines must be performed by military or Government personnel"); 12 U.S.C. § 1701w (permitting Secretary of Housing and Urban Development to contract with public or private organizations to counsel mortgagors insured under certain code provisions); *id.* § 4241(a) (permitting Attorney General to contract with private attorneys to represent United States in civil actions against persons who committed bank fraud); 20 U.S.C. § 2534(a) (permitting Secretary of Education "on a competitive basis, to enter into contracts" with, *inter alia*, private nonprofit organizations to train teachers and counselors); *id.* § 3475 (permitting Secretary of Education to contract with, *inter alia*, "private organizations and persons . . . as the Secretary may determine

or through private entities. See also, *supra*, n.1 (listing congressional authority for private correctional providers). In pursuing privatization, Congress has sought to promote a number of goals, including reducing costs while maintaining or improving quality of services.[27] Other goals furthered by

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necessary or appropriate to carry out functions of the Secretary or the Department"); 24 U.S.C. § 324(a) (permitting Secretary of Health and Human Services ("HHS") to contract with private hospitals for care of certain mentally ill persons); 25 U.S.C. § 452 (permitting Secretary of the Interior to contract with private entities to provide for the education, medical attention, agricultural assistance, and social welfare of Indians); 30 U.S.C. § 937(a) (permitting Secretary of HHS to contract with "public and private agencies and organizations and individuals for the construction, purchase, and operation" of clinics for the diagnosis and treatment of respiratory and pulmonary illness of coal miners); 42 U.S.C. § 604a(a)(1)(A) (permitting States funded through certain Social Security provisions to contract with charitable, religious, or private organizations to perform the funded functions); *id.* § 5150 (permitting contracting with "private organizations, firms, or individuals" to perform disaster and emergency assistance activities and encouraging use of "organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency"); *id.* § 5631(b)(1) (permitting Administrator to contract "with public and private agencies, organizations, and individuals to provide technical assistance" to states, localities, and agencies in performing programs to prevent juvenile delinquency and to improve juvenile justice); *id.* § 11705(a) (permitting Secretary of HHS to enter into contracts with entities to provide health care to native Hawaiians).

[26] *See, e.g.*, 16 U.S.C. § 5959(a)(1) ("To the maximum extent practicable, the Secretary [of the Interior] shall contract with private entities to conduct or assist in those elements of the management of the National Park Service concessions program considered by the Secretary to be suitable for non-Federal performance."); 22 U.S.C. § 2381(a) (requiring agencies and officers, "to the fullest extent practicable," to contract with private enterprises to perform functions under the Foreign Assistance chapter of Title 22).

[27] *See, e.g.*, 139 Cong. Rec. E2554-01, E2554 (daily ed. Oct. 27, 1993), *available at* 1993 WL 435032 (statement of Rep. Crane) (quoting Asmus, *Private Sector Solutions to Public Sector Problems*, Imprimis (Oct. 1993)); 132 Cong. Rec. S3552-02 (daily ed. Mar. 26, 1986) (statement of

privatization include "promoting local job creation and private sector investment in rural communities," 7 U.S.C. § 2204d(a); promoting the interests of small-business concerns, 15 U.S.C. § 631(a); encouraging private investment in "less developed friendly countries," 22 U.S.C. § 2351(a); serving the best interests of patients, 24 U.S.C. § 324(a); promoting firms "owned and controlled by socially and economically disadvantaged individuals," 31 U.S.C. § 3718(b)(1)(B); and promoting competition, H.R. Rep. No. 106-1047 (2001), *available at* 2001 WL 29442 (discussing Pub. L. No. 106-180).

Creating a *Bivens* action against private entities performing government functions, but not against their government counterparts, undermines Congress's efforts to achieve these goals through privatization. As previously noted, by imposing increased costs on private entities, extending *Bivens* liability will cause private entities either to raise their prices or to avoid contracting with the government. See *Boyle*, 487 U.S. at 507; Section II.A. In addition to imposing costs on the federal fisc, this effect risks causing privatization to become unavailable in many instances due to lack of availability of government contractors because of the increased liability risks. Thus, in addition to being inequitable, the disparate treatment proposed by Respondent distorts privatization that would otherwise occur. This, in turn, may prevent many congressional policies from being achieved. Because extending *Bivens* in this context would amount to "harmful and inappropriate judicial intrusion," *Stanley*, 483 U.S. at 681, in

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Sen. Humphrey); 132 Cong. Rec. E403-01 (daily ed. Feb. 20, 1986) (statement of Rep. Courter). *See also* S. Rep. No. 106-77 (1999), *available at* 1999 WL 398160 (discussing privatization of NASA functions to increase cost-effectiveness); H.R. Conf. Rep. No. 106-355 (1999), *available at* 1999 WL 782348, at *119-*20 (discussing possible privatization of air traffic management). In fact, statutory provisions expressly require the Department of Defense to contract with the entity (private or public) which will perform a given function at the lowest cost. *See* 10 U.S.C. § 129a; *id.* § 2462(a).

privatization policy best left to Congress, Respondent's requested extension should be rejected.

Extending *Bivens* liability to private entities raises special concerns by creating different rules for public and private entities performing the same functions and playing similar roles in relation to the Federal Government. Such differential treatment would be illogical, inequitable, and contrary to congressional policy regarding privatization. There would be a special concern about incongruent treatment in any context—but particularly where, as here, a congressional purpose of encouraging privatization is evident. These concerns, whether taken together or separately, counsel this Court not just to hesitate, but to decline altogether to extend *Bivens* liability in this context.

* * * * *

The special factors highlighted herein illustrate the thicket of policy issues in which the courts would inevitably become enmeshed in deciding whether *Bivens* liability should be extended to private entities as defendants.[28] Applying *Bivens* liability to private correctional providers, particularly given that the BOP and FDIC are not subject to suit under *Bivens*, would interfere with both federal fiscal policy and congressional privatization policy. In light of all of these special factors counseling judicial reluctance and deference to a legislative solution, this Court should reject the court of appeals' holding extending *Bivens* liability to private entities.

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[28] Extending *Bivens* here would also raise a host of thorny legal questions. For example, the proposed extension of *Bivens* would require courts to decide whether—and how—to extend *Bivens* to states and municipalities that contract with the Federal Government. *Compare Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998) (refusing to apply *Bivens* to state actors), *with Haynesworth* v. *Miller*, 820 F.2d 1245, 1274 & n.241 (D.C. Cir. 1987) (extending *Bivens* to municipalities but importing Section 1983 limits, *e.g.*, rejection of *respondeat superior* liability and immunity from punitive damages on liability).

III. SECTION 1983 IS IRRELEVANT TO THE QUESTION OF WHETHER TO CREATE A NEW *BIVENS*-TYPE ACTION.

In applying *Bivens*, the Court has both the duty and the opportunity to consider whether a given extension serves the purposes of the *Bivens* remedy and whether special factors weigh against doing so. This role contrasts sharply with the Court's role in applying the cause of action created by Congress in 42 U.S.C. § 1983.[29] As shown above, *Bivens* is a narrow, judge-made gap filler with a specific goal of deterring individual officers from violating the Constitution. By contrast, Section 1983 is part of a broad and inclusive congressional remedial scheme providing an all-purpose vehicle for "monetary, declaratory, or injunctive relief," *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 690 (1978), against "[e]very person" violating constitutional rights under color of state law, 42 U.S.C. § 1983.

Consistent with its expansive remedial scope, Section 1983 has a "textual" basis and a broader sweep than does *Bivens*. Section 1983 permits plaintiffs to bring a cause of action against "*[e]very person*" who deprives them of constitutional rights under color of state law, which includes more than natural persons. 42 U.S.C. § 1983 (emphasis added); *Monell*, 436 U.S. at 683. Indeed, "[a]n examination of the debate on [Section 1983] and the application of appropriate rules of construction show unequivocally that [Section 1983] was intended to cover legal as well as natural persons." *Monell*,

[29] The Second Circuit below asserted, without analysis, that there is "no reason not to incorporate [Section 1983] law into the *Bivens* context and permit suits against private corporations engaging in federal action," Pet. App. 12a (citing *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982)); *see also Hammons* v. *Norfolk S. Corp.*, 156 F.3d 701, 708 (6th Cir. 1998) (finding "no valid reason" not to apply Section 1983 jurisprudence to extend *Bivens* to private corporations). This assumption ignores both binding precedent and the many reasons why Section 1983 is of no use in resolving the threshold question of whether to extend a *Bivens* action to private entities.

436 U.S. at 683. Thus, Section 1983, with its broad definition of "person" and broad remedial mission, necessarily reaches private parties, both individuals and entities, if sufficient state action is shown. See *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 942 (1982).

The breadth of Section 1983 is no accident, for Congress designed Section 1983 to remedy a broad problem:

> The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights. The debates on the Act chronicle the alarming insecurity of life, liberty, and property in the Southern States, and the refuge that local authorities extended to the authors of these outrageous incidents . . . .

Wilson v. *Garcia*, 471 U.S. 261, 276 (1985) (citation omitted). As such, a central purpose of Section 1983 has always been to address the acts of *all* private parties acting under color of state law.

By contrast, *Bivens* was designed to solve a narrow problem and to reach a narrow class of defendants. See Section I. "[T]he logic of *Bivens*" supports a very narrow cause of action: "to deter *the officer*" through the direct threat of litigation and liability for damages against that officer. *FDIC* v. *Meyer*, 510 U.S. 471, 485 (1994). In addition, and in part because it is a judge-made cause of action, courts must consider whether special factors exist that make it more appropriate to look to Congress to create a remedy. See *Chappell* v. *Wallace*, 462 U.S. 296, 298 (1983); *Butz* v. *Economou*, 438 U.S. 478, 503 (1978).

It is both unsurprising and appropriate that the Court crafted a narrower remedy in *Bivens* than did Congress in Section 1983. Unlike Congress, the courts cannot hold hearings and determine whether a broader remedy is appropriate. See *Bush* v. *Lucas*, 462 U.S. 367, 389 (1983)

("Not only has Congress developed considerable familiarity with balancing governmental efficiency and the rights of [individuals], but it also may inform itself through factfinding procedures such as hearings that are not available to the courts."). Instead, courts rightly proceed cautiously.

Recognizing the critical distinctions between the institutions that created these two remedies, this Court has made clear that, while Section 1983 caselaw may be helpful in evaluating how to *apply* immunities to an established *Bivens* remedy, Section 1983 is not relevant to the question of whether to *create* a *Bivens*-type remedy. See *Butz*, 438 U.S. at 503 (juxtaposing the threshold analysis of whether a cause of action exists under *Bivens* from the decision of whether to apply an immunity recognized in the Section 1983 context to an established *Bivens* action); cf. *United States* v. *Stanley*, 483 U.S. 669, 684 (1987) ("[W]hether a damages action for injury . . . can be founded directly upon the Constitution—is analytically distinct from the question of official immunity from *Bivens* liability."). Indeed, Section 1983 could not be relevant to this threshold inquiry: Whether a given application would deter constitutional violations or whether "special factors counsel hesitation" is irrelevant under Section 1983, but courts will not extend the *Bivens* remedy without undertaking precisely that two-step analysis. In this case, that analysis compels the conclusion that extension is inappropriate.

* * * * *

Far from serving the core *Bivens* purpose of deterring individual officers—the persons targeted by the *Bivens* action and the ones actually in contact with the public—from engaging in constitutional torts, implying a remedy against an entity would actually undermine that purpose. See *Meyer*, 510 U.S. at 485. That fact, which itself compels the conclusion that extending *Bivens* is not appropriate, is buttressed by the utter lack of any reason to believe that Respondent, and similarly situated plaintiffs, lack an adequate remedy for

constitutional torts committed by employees of private entities. But even if the proffered extension "were consistent with *Bivens*," it would be unwise to expand *Bivens* to this context in light of the "'special factors counselling hesitation.'" *Id.* at 486 (quoting *Bivens*, 403 U.S. at 396). Because Respondent cannot establish either component deemed essential to support a judge-made expansion of *Bivens*, the Court should decline his request to extend *Bivens* to private entities.

CONCLUSION

The decision of the court of appeals should be reversed.

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IN THE

Supreme Court of the United States

CORRECTIONAL SERVICES CORPORATION,
Petitioner,

v.

JOHN E. MALESKO,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

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QUESTION PRESENTED

May a private corporation, operating a correctional facility under color of federal law, be held liable under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1997), for its violation of an inmate's constitutional rights?

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STATEMENT OF THE CASE

A. Factual Background

John E. Malesko is a former federal prisoner who served the last four months of his sentence at Le Marquis Community Corrections Center, a halfway house operated by Correctional Services Corporation ("CSC"), and, after suffering the injuries that gave rise to this action, in the hospital. In December 1992, at the age of 58, Mr. Malesko was convicted of securities fraud and sentenced to eighteen months' imprisonment under the supervision of the Federal Bureau of Prisons ("BOP"). Pet. App. 2a. While in prison, Mr. Malesko was diagnosed with congestive heart failure. This condition required Mr. Malesko to take prescription medication and to refrain from physical exertion such as climbing stairs. Jt. App. 10-11.

In February 1994, BOP transferred Mr. Malesko to Le Marquis. CSC, a publicly traded corporation, operated Le Marquis for profit.[1] Despite his medical condition, CSC assigned Mr. Malesko to a fifth-floor room. On March 1, 1994, CSC instituted a policy requiring Le Marquis inmates to take the stairs to their rooms if they lived below the sixth floor, but because of his illness, Mr. Malesko was allowed to continue using the elevator. Jt. App. 11.

On March 18, Mr. Malesko informed CSC that he had run out of his heart medication. CSC did not refill the prescription. *Id.* at 12. Ten days later, a CSC guard compelled Mr. Malesko to take the stairs to his room quickly even though Mr. Malesko reminded him that, because of his heart condition,

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[1] CSC no longer operates Le Marquis. CSC Annual Report, SEC Form 10K at 10 (filed Apr. 2, 2001) (available at www.freeedgar.com, ticker symbol CSCQ).

he was allowed to use the elevator. *Id.* As Mr. Malesko was hurrying up the stairs so that he could be in his room in time for a head count, he suffered a heart attack and fell. Pet. App. 20a; Jt. App. 12. The fall injured his ear and caused ongoing difficulty with balance. Mr. Malesko's injuries have left him unable to work and in need of continuing medical care. Jt. App. 12-13.

B. Proceedings Below

Mr. Malesko filed this action *pro se* on March 27, 1997, in the United States District Court for the Southern District of New York, against petitioner CSC and ten "John Doe" defendants. The complaint has been treated throughout this case as alleging claims only under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). On February 2, 1999, Mr. Malesko, who had since retained counsel, filed an amended complaint naming Jorge Urena, the guard who denied him use of the elevator, as one of the John Doe defendants. CSC filed a motion to dismiss, which the district court granted on July 28, 1999. In that decision, the district court held that, because Mr. Malesko's identification of Mr. Urena in the amended complaint did not relate back to the filing of the orginal complaint, it was time-barred. Pet. App. 22a-24a. The Second Circuit affirmed this holding, Pet. App. 18a, and Mr. Malesko does not challenge it now. With no explanation of its reasoning, the district court also held that under *FDIC v. Meyer*, 510 U.S. 471 (1994), a *Bivens* action can be maintained only against an individual, Pet. App. 20a, even though *Meyer* held only that no *Bivens* action lies against federal government agencies.

The Second Circuit reversed as to CSC, holding that a *Bivens* action may lie against a private corporation acting under color of federal law. The court first noted that, before *Meyer*,

it was settled law among the federal circuits that *Bivens* claims could be asserted against private corporations. Although several circuits had not addressed the question, all those that had, had held that the cause of action was available. Pet. App. 5a-6a (citing *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987); *Gerena v. Puerto Rico Legal Serv., Inc.*, 697 F.2d 447 (1st Cir. 1983); *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219 (5th Cir. 1982); *Yiamouyiannis v. Chemical Abstracts Serv.*, 521 F.2d 1392 (6th Cir. 1975) (per curiam)). The Second Circuit noted that *Meyer* did not address these cases or suggest that it was overruling them. *Id.* at 12a. Since *Meyer* was decided in 1994, only three courts of appeals have addressed the question presented here. The Sixth Circuit, in reasoning largely adopted by the Second Circuit below, held that *Bivens* does encompass claims against private corporations. *Hammons v. Norfolk Southern Corp.*, 156 F.3d 701 (6th Cir. 1998). Using broad language, the D.C. Circuit has held that *Meyer* shielded from *Bivens* liability a school with very close ties to the U.S. and British governments, an entity that was in the Second Circuit's view "arguably a federal government agency." *Kauffman v. Anglo-American School of Sofia*, 28 F.3d 1223 (D.C. Cir. 1994); Pet. App. 11a n.3.

The court below explained that *Meyer* is not dispositive in this case because "private entities acting on behalf of the federal government are not the equivalent of federal agencies." *Id.* at 10a. Nor did the court find the reasons underpinning *Meyer* compelling with respect to private corporations. As the court of appeals noted, *Meyer* did not address *Bivens*' central goal of providing a remedy for constitutional violations, and that goal can be achieved here only by allowing a *Bivens* claim against CSC. *Id.* at 10a-11a. Allowing the claim to go forward, the Second Circuit found, would also serve *Bivens*' deterrence purpose because "an employer facing exposure to such liability would be motivated to prevent unlawful acts by its employees."

Id. at 11a. *Meyer*'s concern with the direct impact that federal agency liability would have on fiscal policy is inapposite here, observed the court, where any fiscal impact on the government would be indirect at best. *Id.* Finally, the court saw no reason not to incorporate the law governing claims under 42 U.S.C. § 1983, which does impose liability on private corporations acting under color of state law. *Id.* at 12a.

SUMMARY OF ARGUMENT

Thirty years ago, this Court recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that the Constitution itself limits the exercise of federal power and that damages are an appropriate remedy for those who have suffered constitutional violations under color of federal law. *Bivens* therefore recognized a cause of action for damages against those who violate constitutional rights under the color of federal authority. This principle is limited only by the doctrine of sovereign immunity, which bars suits against the United States and its agencies. As a private, for-profit corporation, CSC is decidedly *not* the federal government, so sovereign immunity does not shield it. Allowing CSC to enjoy the benefits of sovereign immunity would gratuitously insulate its shareholders against the cost of a judgment in Mr. Malesko's favor, and would disserve the twin purposes of *Bivens* — compensation and deterrence.

There is no question here that CSC was responsible for Mr. Malesko's injuries. Either CSC's policies deprived Mr. Malesko of needed medication, assigned him to a fifth-floor room, and compelled him to take the stairs, or its failure to train and supervise its employees led them to disregard his life-threatening medical condition. In either case, the injuries Mr. Malesko suffered are plainly CSC's responsibility. Recognizing Mr. Malesko's claim against CSC fulfills *Bivens*' purposes of

affording compensation to the victim of unlawfully exercised federal power, and deterring the unconstitutional abuse of federal authority.

As a private corporation contracting with the federal government, CSC performs much the same function as an intermediate to high-level federal employee. It sets policies for its employees who wield federal power and controls their hiring, training, and supervision. Its unconstitutional exercise of federal power is best deterred through the imposition of money damages. Because private corporations, unlike the federal government, are not accountable through the political process, penalizing CSC financially is the only effective way to control, not only its corporate behavior, but also the behavior of its employees. Moreover, private corporations, unlike government agencies subject to civil service laws, have great flexibility to impose financial incentives and deterrents on their employees. The federal government acknowledges the company's responsibility and control over its employees by requiring CSC to assume responsibility for litigation against its employees. Furthermore, the *Bivens* remedy itself is needed to deter the unconstitutional exercise of federal power. State law remedies, which are oriented toward different problems and do not address all unconstitutional misconduct, are inadequate.

Recognizing a *Bivens* claim directly against CSC imposes no greater risk of uncontrolled financial exposure on the government than does the routine availability of suits against federal officials under *Bivens*. The government is protected financially by its contract with CSC, which requires CSC to insure itself and its employees against damages awards, and by its freedom to choose less expensive contractors. The government already indemnifies its own employees for their *Bivens* liability. The financial effect on the government of *Bivens* awards against a contractor is much less direct than is

the effect of *Bivens* awards against government employees. Finally, *Bivens*' *purpose* is to discourage constitutional violations by those cloaked with federal power. Holding CSC liable when it uses federal power to violate the Constitution fulfills this purpose by giving CSC a powerful financial incentive to obey the Constitution's dictates. CSC's success in following the law will in turn limit the insurance costs it may seek to pass on to the government.

Bivens' narrow exceptions, which make the remedy unavailable when Congress has created an equally effective substitute or there are special factors counseling hesitation, do not apply here. The characteristics that CSC calls "special factors" — its corporate status, the possibility that its insurance rates will rise, and the fact that Congress allows some agencies to use contractors — do not counsel any hesitation in allowing Mr. Malesko's claim to proceed.

CSC's hand-wringing over the possibility that its insurance rates might go up obscures its central contention: that private corporations, which have no claim to sovereign immunity and which are subject to section 1983 liability when they violate the constitutional rights of their state prisoners, should nonetheless be held immune from *Bivens* liability when they violate the constitutional rights of their federal prisoners. There is simply no reason to make this leap. CSC exercises federal power; it houses federal prisoners in closed institutions protected from public scrutiny; and it can easily force prisoners like Mr. Malesko into life-threatening situations. *Bivens* makes clear that CSC should be held liable when it uses federal power to violate the Constitution.

ARGUMENT

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court explicitly recognized that the federal Constitution establishes a cause of action for damages against those who violate constitutional rights under color of federal authority. The foundation for *Bivens*, however, was laid in the earliest days of this Court. Two centuries ago, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), this Court declared that "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." This sentiment — that remedies must follow the violation of constitutional rights — was echoed again fifty-five years ago in *Bell v. Hood*, 327 U.S. 678, 684 (1946). There, while reserving the precise question decided in *Bivens*, the Court emphasized that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

The *Bivens* cause of action — and only this cause of action — enforces our nation's paramount rights by providing a damages remedy for those whose constitutional rights are violated at the hands of federal officers or by those who are cloaked with federal power. The only limit this Court has recognized on *Bivens*' reach is for governmental entities, namely the United States itself and its agencies, entitled to invoke absolute sovereign immunity — an immunity which is waivable only by Congress.[2] Never has this Court suggested that private

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[2] Sovereign immunity sets the outer boundary to *Bivens*' reach by forbidding suits against the government. There is no

individuals or corporations, exercising federal power while doing the government's bidding for a fee, are entitled to claim *any* sovereign immunity, much less an immunity that is absolute. *Cf. Richardson v. McKnight*, 521 U.S. 399 (1997) (holding that employees of a private prison are not entitled to qualified immunity in a section 1983 action). Therefore, CSC's claim that the Court should equate a private corporation with the United States or one of its agencies should be rejected out of hand. Immunity belongs to the government, not contractors with which it does business.

Moreover, prisoners and others in federal custody, like respondent Malesko, are uniquely vulnerable to the abuse of federal power. The *Bivens* remedy is often these individuals' last and only protection against the deliberate deprivation of their constitutional rights. Mr. Malesko is not asking this Court to establish any new cause of action. He is simply pursuing the remedy recognized in *Bivens* against an unconstitutional abuse of federal power by a defendant who has no legitimate claim to any sovereign immunity. The judgment below should be affirmed.

I. *Bivens* Encompasses Mr. Malesko's Claim Against CSC.

To best understand the flaws in petitioner's argument, it is useful to begin with a detailed examination of the cause of action recognized in *Bivens*. There, this Court answered a question that it had left open twenty-five years earlier in *Bell v.*

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other limit to the class of defendants subject to *Bivens* actions. As explained below, there are also narrow exceptions to *Bivens* when Congress has established an alternative remedy, and when special factors counsel hesitation in applying *Bivens*.

Hood and held "[t]hat damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials." *Bivens*, 403 U.S. at 395. Webster Bivens alleged that federal narcotics agents had arrested him and had searched his home without a warrant or probable cause and used unreasonable force in doing so. *Id.* at 389. This Court rejected defendants' argument that state tort law provided Bivens's sole remedy. Instead, it focused on defendants' exercise of federal power and held that citizens may invoke the Constitution's protection against the abuse of that power even in the absence of any Congressional action authorizing a remedy. *Id.* at 392.[3]

The theory of *Bivens*, which is crucial to this case, is that the Constitution itself "operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize

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[3] The government suggests that *Bivens* relied too heavily on *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), a case implying a private right of action under a federal securities statute, and that its analysis is therefore outmoded. This argument misses the mark. *Borak* involved invasions of statutory rights, and this case involves constitutional violations. The courts' obligation to uphold the Constitution is more fundamental — and more important — than any rule of statutory construction. *Marbury*, 5 U.S. at 176-78. Furthermore, whatever suggestive value *Borak* may have had for the Court in deciding *Bivens*, it has long been clear that the *Bivens* doctrine is independent of *Borak*. This point was made explicit in *Davis v. Passman*, 442 U.S. 228, 238-44 (1979), which was decided after *Borak* had fallen out of favor, *see, e.g., Cort v. Ash*, 422 U.S. 66 (1975). *See also Bush v. Lucas*, 462 U.S. 367, 374 (1983) ("The federal courts' power to grant relief not expressly authorized by Congress is firmly established.").

the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from" unconstitutional injury. *Id.* Where, as here, "federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id. (quoting Bell v. Hood*, 327 U.S. at 684 (footnote omitted)); *accord Bemis Bros. Bag Co. v. United States*, 289 U.S. 28, 36 (1933). *Bivens* suits have been allowed to proceed to redress violations not only of the Fourth Amendment, as in *Bivens*, but also the Eighth and Fifth Amendments. *Carlson v. Green*, 446 U.S. 14, 19-20 (1980); *Davis v. Passman*, 442 U.S. 228, 248-49 (1979). The only limitation on the basic *Bivens* principle is that the federal government itself is immune from liability and hence may not be sued under *Bivens*.

Thus, the rule of *Bivens* is that a cause of action lies against a party that has exercised federal power in a manner that has deprived the plaintiff of a constitutionally guaranteed right. Contrary to petitioner's argument, the *Bivens* cause of action is not defined by the potential list of defendants who may be subject to such claims. Rather, *Bivens* focuses on the abuse of federal power and seeks to remedy and deter that abuse without regard to the identity of the defendant. Nothing in the logic underlying *Bivens* or its holding suggests that the absolute immunity enjoyed by the federal government should be extended to a non-government, private corporation that exercises federal power for profit.

To be sure, *Bivens* acknowledges the possibility that Congress might establish an alternative remedy that would displace the *Bivens* action or that some cases might present "special factors counseling hesitation" in the recognition of a cause of action. 403 U.S. at 396-97. But *Bivens* rejected the idea that any of the factors cited by the United States (and

resurrected here by both CSC and the United States) — including the potential drain on the public fisc — counseled against its holding or constituted "special factors." *Id.* This suit does not fall within either of *Bivens*' exceptions. Rather, it falls within the heartland of *Bivens* cases exemplified by the Court's recent decision in *Wilson v. Layne*, 526 U.S. 603 (1999), which recognized *Bivens* and section 1983 claims against federal and state officers who allowed newspaper reporters and photographers to accompany them into a suspect's home in violation of the Fourth Amendment.

Earlier cases also illustrate *Bivens*' scope. In *Davis*, a former Congressman's assistant brought a Fifth Amendment *Bivens* claim against him when she was fired because of her gender. The Court held that *Bivens* encompassed the claim, despite Title VII's specific exclusion of Congressional employees and despite the possible constitutional difficulties in discerning whether the Speech and Debate Clause protected the Congressman's action. 442 U.S. at 245-48. In *Carlson v. Green*, the plaintiff's son had died of an asthma attack while in federal prison, allegedly because the defendants failed to provide competent medical treatment and in fact took counterproductive measures. This Court held that *Bivens* encompassed Eighth Amendment claims and that the Federal Tort Claims Act, while available to the plaintiff as a parallel remedy, did not displace the *Bivens* action. 446 U.S. at 19-23.

This case falls at the core of *Bivens*' holding. Petitioner CSC, an entity exercising federal power, has allegedly violated the constitutional rights of a person in its custody. As in *Bivens*, state tort law cannot guarantee an adequate remedy, there are no special factors counseling hesitation, and a damages award will achieve both deterrence of the wrongdoers and compensation for the victim. The corporate status of the entity does nothing to alter the *Bivens* analysis; indeed, the fact that

this defendant cannot hide behind the shield of sovereign immunity makes this case straightforward.

A. As a Private Entity, CSC Is Not Entitled to Immunity When It Violates The Constitution Under Color of Federal Law.

CSC's position boils down to a claim that, because it is a corporation, rather than an individual, it may not be sued under *Bivens*. In making this argument, CSC does not point to any passage in *Bivens* or in any subsequent cases that suggests that the status of the defendant (individual or corporate) matters one whit. Nor could it. The only entities found outside of the ambit of *Bivens* have been the federal government itself, or entities this Court has held to *be* the federal government for purposes of immunity. Thus, unless CSC can demonstrate that it, a private, for-profit corporation that is beholden only to its shareholders and not the American people, is somehow entitled to invoke the protective mantle of sovereign immunity, its argument fails.

The law of sovereign immunity in *Bivens* suits parallels that in suits under 42 U.S.C. § 1983; if anything, section 1983 immunity law is more protective of the government. As this Court explained in *Butz v. Economou*:

> [I]n the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983. The constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which

> federal officials may be responsible.... Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers.

438 U.S. at 500-01 (emphasis in original). This Court has held that private defendants are not entitled even to qualified immunity from section 1983 suits. *McKnight*, 521 U.S. 399; *Wyatt v. Cole*, 504 U.S. 158 (1992). It is well-established that both private and public corporations can be sued under section 1983, and neither may raise a qualified immunity defense. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982); *Owen v. Independence*, 445 U.S. 622 (1980). Contractors who provide services to state prisons can also be held liable under section 1983. *West v. Atkins*, 487 U.S. 42 (1988). Absolute immunity has never been thought to bar a section 1983 claim paralleling Mr. Malesko's; indeed, insofar as respondent can determine, no corporation subject to a section 1983 action has ever sought to invoke absolute immunity, let alone succeeded in doing so.

Moreover, sovereign immunity has only been extended in situations where both history and policy demand it. *Cf. McKnight*, 521 U.S. at 404; *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986) ("Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts."). There is no historic tradition of immunity of any sort for private prisons, regardless of whether they were operating under local, state, or federal contract. In the nineteenth century, private contractors played an important role in prison management, especially in the South. *McKnight*, 521 U.S. at 405. The common law authorized mistreated prisoners to sue their prison contractors, even when those contractors were corporate in form. *Dade Coal Co. v. Haslett*, 83 Ga. 549 (1889) (suit for injuries sustained while

convict was on lease to private company); *Dalheim v. Lemon*, 45 F. 225 (1891) (contracting firm liable for convict injuries); *Edwards v. Pocahontas*, 47 F. 268 (CC Va. 1891) (suit against municipal corporation over prison conditions); *see generally McKnight*, 521 U.S. at 405-06.

There is no policy reason to extend sovereign immunity to bar Mr. Malesko's constitutional claim against CSC. A defendant seeking absolute immunity "'must bear the burden of showing that public policy requires an exemption of that scope.'" *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (quoting *Economou*, 438 U.S. at 506); *accord McKnight*, 521 U.S. at 404. Defendants that were far more closely linked to the federal government than CSC have sought absolute immunity, only to have this Court reject their claims in case after case. For example, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court held that Presidential aides, like Executive Branch officials generally, are not generally entitled to absolute immunity. *Saxner*, 474 U.S. at 205, established that members of a federal prison's discipline committee were not entitled to absolute immunity despite the committee's adjudicatory function. Even the President of the United States himself is not immune to suit for his unofficial conduct. *Clinton v. Jones*, 520 U.S. 681, 694-95 (1997). *Westfall v. Erwin*, which reversed a holding that sovereign immunity barred certain state tort law claims, explains why absolute immunity is so rarely available:

> This Court always has recognized, however, that official immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official. Moreover, absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct.

> We therefore have held that absolute immunity for federal officials is justified only when "the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens."

484 U.S. 292, 295-96 (1988) (quoting *Doe v. McMillan*, 412 U.S. 306, 320 n.3 (1973)).

This Court in *McKnight* soundly rejected the argument that private prisons will suffer from "overly timid, insufficiently vigorous, unduly fearful, or 'non-arduous' employee job performance" if their employees are denied even *qualified* immunity from constitutional claims. 521 U.S. at 410. If individual employee liability does not pose a threat to private prison performance, it is hard to see why corporate liability would do so, and certainly CSC has made no such showing. Indeed, the "marketplace pressures" that prevent excess timidity in private prison guards operate even more directly on the private corporation that stands to make a profit or suffer a loss. The different rewards and constraints of the marketplace — including the possibility of losing the prison contract, greater freedom in managing employees, and mandatory insurance coverage — enable private corporate prison operators to function even when exposed to liability for their constitutional torts. *Id.* at 409-411. Government employees "act within a *different* system." *Id.* at 410 (emphasis in original). Unlike employees of a private firm, government employees are responsible through elected officials to voters. Multidepartment civil service rules often limit government supervisors' abilities to reward or punish their employees. *Id.* Private corporations like CSC are not similarly constrained. The policy reasons underlying the qualified immunity defense for public employees cannot justify denying Mr. Malesko the remedy to which the Constitution entitles him. *Cf. id.* at 412.

In light of these factors, CSC does not overtly make a claim to sovereign immunity. Rather, it makes immunity-like arguments to contend that it would be wrong for the Court to "extend" *Bivens*' coverage to corporations doing the government's business. This contention is without merit. Sovereign immunity doctrine is grounded principally in the desire to protect the public fisc, although this Court has also cited the government's interest in performing its functions smoothly and in not creating unwarranted timidity on the part of government officers. *McKnight*, 521 U.S. at 407-08; *Erwin*, 484 U.S. at 296-97 (citing *Barr v. Matteo*, 360 U.S. 564, 571 (1959)); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949). In this case, where the party seeking the shield of immunity is a corporation, not the government, none of these concerns is legitimate.

CSC's *Bivens* liability to Mr. Malesko likely poses *less* threat to the federal fisc than does the parallel *Bivens* action against a federal officer in CSC's position; surely it does not pose more risk. To begin with, CSC insures itself against a variety of business risks, including the risk of liability for torts, constitutional and otherwise. CSC Annual Report, SEC Form 10K at 12 (filed Apr. 2, 2001) (available at www.freeedgar.com, ticker symbol CSCQ); CSC Prospectus at 24 (Sept. 12, 1996), Joint Appendix in the United States Court of Appeals for the Second Circuit, at 142. Indeed, the federal government *requires* the private prisons with which it contracts to carry liability insurance. *Id.*; Bureau of Prisons, Statement of Work: Community Corrections Center 8 (Dec. 2000) [hereinafter "BOP Statement of Work"] (available at http://www.bop.gov/ccdpg/ccdccc.pdf). And it is CSC's "general practice to indemnify individual employees who are sued in connection with matters arising within the scope and course of their employment, and which are not criminal in nature." Letter from George P. Stasiuk to Steven Pasternak at

1 (Jan. 11, 1999), Joint Appendix in the United States Court of Appeals for the Second Circuit, at 153. Thus, like the private prison corporation at issue in *McKnight*, which had purchased insurance to protect itself and indemnify its employees who were subject to liability under section 1983, CSC's potential liability here is addressed fundamentally as a matter of insurance. For that reason, CSC's premiums will likely be influenced, if not directly affected, by how well it implements policies that prevent constitutional deprivations. The more damages actions resulting in compensatory damages awards, the greater the likely increase in its premiums. If those premiums climb to an unacceptable level (that is, where it is financially better for the United States not to contract with CSC), CSC will either lose its contracts to competitors that do a better job of avoiding constitutional tort actions and thus keeping their costs low, or the United States will conclude that the inability of private prisons to deter constitutional violations requires it to resume prison management responsibility itself. On the other hand, the better the job CSC does in deterring constitutional abuses, the more its premiums are likely to fall, which will save it money, enhance its ability to bid competitively on government contracts, and in the long run, possibly benefit the United States through a lower contract price. This is precisely the deterrent effect that *Bivens* meant to achieve. The incentives on CSC to eliminate constitutional abuses therefore counsel in favor of, not against, holding it subject to liability in this case.[4]

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[4] Moreover, if one takes at face value CSC's claim that a Bivens action is not needed here because Mr. Malesko has adequate state law remedies, then one wonders how CSC can possibly contend that finding liability here would have serious fiscal consequences. If we assume for the sake of argument that Mr. Malesko's claim might be worth $1,000,000 in a state law tort action, why should it matter that the claim might also be

Whatever impact constitutional tort liability may have on CSC, it is hard to see how CSC's liability here could have any effect on the public treasury. The United States has fully insulated itself against liability in its contract with CSC. Moreover, the federal government already bears the responsibility for paying both litigation costs and most damages awarded against its employees in *Bivens* actions arising out of conduct within the scope of their employment. 28 C.F.R. § 50.15; Pet. Br. at 10-11 n.8. Thus, the baseline here is that the United States already underwrites most of the expense of *Bivens*. Contracting out may *reduce* the cost to the United States from *Bivens*, but it can hardly increase it. Making it clear that contractors, as well as their employees, may be held liable under *Bivens* does not alter that fact. Through contracting, of course, the United States can control its potential *Bivens* costs by either requiring those costs to be absorbed by its contractors (which it already does), or, if it is dissatisfied with the contract prices because they are equal to or exceed the costs to the United States of operating prisons, by resuming direct responsibility for prison management.

Furthermore, unlike the federal government, CSC is subject to state tort law. If, as CSC claims, state tort law is an

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restated as a *Bivens* action, tried in federal court, with a damages award of $1,000,000? The impact on the corporation's bottom line is the same. Although, as explained later in this brief, there is no parallel state law remedy for all, perhaps even most, constitutional deprivations, CSC is plainly trying to have it both ways in arguing that a ruling in Mr. Malesko's favor would have dire fiscal consequences at that same time it argues that there is no need to permit Mr. Malesko's *Bivens* action to proceed because state law remedies are adequate.

adequate substitute for *Bivens*, then allowing *Bivens* actions against CSC will not add to CSC's costs. But to the extent a *Bivens* remedy against CSC does add to CSC's potential liability, that incremental cost — which is likely to be far less than the tort costs CSC already faces — can surely be addressed through insurance. In choosing to use prison operators that are subject to state tort liability, Congress and BOP decided that their insurance requirements adequately protect the contractors against whatever liability they may incur. Recognizing that *Bivens* applies to CSC and its employees, just as it applies to the federal employees who run other prisons, does not increase the government's burden.

B. Insulating CSC from Suit Because of Its Corporate Status Would Run Counter to *Bivens*' Purposes.

The *Bivens* remedy exists because of this Court's recognition that "[a]n agent acting — albeit unconstitutionally — in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." 403 U.S. at 392. The *Bivens* action enforces the Constitution's "limitation upon the exercise of federal power"; the particular defendant is important only insofar as it is the conduit of federal power. *Id.* Everyday wrongs between private citizens can be, and properly are, addressed through state tort law. But an officer cloaked in federal authority is special. He can bring to bear on an individual the full weight of federal power to enforce his instructions, and the ultimate source of his power — the federal government — is in theory constrained by the Constitution, but absolutely immune from suit. The only way to deter the unconstitutional exercise of federal power, and to compensate its victim, is therefore to make the officer liable. *Id.* at 391-92.

The *Bivens* remedy was initially focused on compensation, and that remains a vital purpose of the action. *Id.* at 395-96. "The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury to plaintiff caused by defendant's breach of duty." *Carey v. Piphus*, 435 U.S. 247, 254-55 (1978) (emphasis in original) (internal quotation marks and citation omitted). As Justice Harlan phrased it in his *Bivens* concurrence, "it is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position.... the sovereign still remains immune to suit.... [and] the 'exclusionary rule' is simply irrelevant. For people in Bivens' shoes, it is damages or nothing." 403 U.S. at 409-410 (Harlan, J., concurring). This Court has recognized the importance of compensation for constitutional violations in other contexts as well. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) (holding that Due Process Clause requires compensation for taxes paid under a state law that violated the dormant Commerce Clause). Even if the *Bivens* action had no deterrent effect on private corporations, which it plainly does, the action would be needed to accomplish the complementary *Bivens* goal of providing a remedy for constitutional violations. As Justice Harlan observed in his *Bivens* concurrence:

> I agree with the Court that the appropriateness of according Bivens compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct. Damages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result. Bivens, after all, has invoked judicial processes claiming entitlement to compensation for injuries resulting from

> allegedly lawless official behavior, if those injuries are properly compensable in money damages. I do not think a court of law — vested with the power to accord a remedy — should deny him his relief simply because he cannot show that future lawless conduct will thereby be deterred.

403 U.S. at 407-08 (Harlan, J., concurring) (footnote omitted).

Deterring unconstitutional conduct is the second pillar of *Bivens*. *FDIC v. Meyer*, 510 U.S. 471, 485 (1994); *Green*, 446 U.S. at 21 ("It is almost axiomatic that the threat of damages has a deterrent effect ....") It is no less important to deter CSC's unlawful conduct than it was to deter the officers' unlawful conduct in *Bivens*. To be sure, the *Bivens* defendants violated the Bivens's Fourth Amendment rights when they searched and humiliated the Bivens family and seized Webster Bivens. Those injuries were grave. But as this case exemplifies, CSC literally has the power of life and death over the inmates entrusted to its supervision. As set forth in the complaint, CSC assigned Mr. Malesko a fifth-floor room, deprived him of needed medicine for his heart condition, and then forced him to rush up so many flights of steps that he suffered a heart attack, which could well have been fatal. Jt. App. 12. As BOP policies recognize, prisoners are uniquely vulnerable to their guards. *See, e.g.*, Program Statement 5566.05, Use of Force and Application of Restraints on Inmates (available at www.bop.gov); BOP Statement of Work at 71-81 (providing detailed guidelines for prison discipline). It is especially important that those who operate prisons be reminded that the Constitution speaks directly to them. As this Court recently noted, prisons present a "continual and conceded need for deterring constitutional violations." *McKnight*, 521 U.S. at 412; *cf. DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489

U.S. 189, 199-200 (1989). It is precisely because a criminal conviction strips a prisoner of so many rights that those rights that remain must be vigilantly safeguarded.

C. CSC Is Not Entitled to Immunity by Analogy.

1. No Parallel Can Be Drawn Between CSC and a Federal Agency.

A damages remedy is a uniquely appropriate deterrent for a private corporation. As a publicly-traded corporation, CSC exists to make money for its shareholders. *See, e.g., United States v. Bynum*, 408 U.S. 125, 137-38 (1972) (corporate officer owes fiduciary duty to corporation and its shareholders); American Law Institute, *Principles of Corporate Governance* § 2.01(a) (1994) ("a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain"). The obvious way to deter CSC is therefore to subject it to financial liability for its actions. CSC itself acknowledges that the threat of liability is a powerful incentive to improve its behavior: Its annual report states that CSC follows American Correctional Association guidelines in part to establish a "better defense against lawsuits by offenders alleging violations of civil rights." CSC Form 10K at 11. This Court recently observed that not only are firms motivated to respond to financial pressure, they are designed to do so: "The organizational structure is one subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide — pressures not necessarily present in government departments." *McKnight*, 521 U.S. at 412.

In contrast, government agencies are designed to operate without making a profit. An agency's ability to spend money is

limited only by Congress' willingness to fund it. Rather than profit-making, the agency's object is to serve the public. For example, the mission statement of the Department of Justice, which includes BOP, is:

> To enforce the law and defend the interests of the United States according to the law, to provide Federal leadership in preventing and controlling crime, to seek just punishment for those guilty of unlawful behavior, to administer and enforce the Nation's immigration laws fairly and effectively, and to ensure fair and impartial administration of justice for all Americans.

http://www.usdoj.gov/02organizations/index.html.

The different goals of corporate and governmental entities manifest themselves in different constraints. A corporation is constrained by costs and revenues; an agency is constrained by politics. Each agency answers to political masters: the President and Congress. Agencies are ultimately accountable to the public, and so their activities are also subject to scrutiny under the Freedom of Information Act, 5 U.S.C. § 552, and other open government laws. It is in an agency's political interest to be viewed as performing well and within the law. Political appointees also need to be seen as honest and effective in order to further their own careers and keep their party in power. As this Court observed in *Carlson v. Green*, it is reasonable to assume that "responsible [civil service] superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity." 446 U.S. at 21.

A private corporation, of course, is not accountable to the President, Congress, or the public, especially when

compared to a federal agency. Corporations are accountable principally to their boards and shareholders. To the extent that CSC is legally accountable to the government, the accountability comes from BOP's contract-based authority to monitor CSC's performance and, if necessary, to litigate to enforce the contract. BOP may also refuse to renew the contract. Under no theory can CSC claim that it is accountable to the American people in the same manner or to the same degree as BOP, its federal counterpart.

Nonetheless, the core of CSC's argument is that, as a corporation, it is more like a government agency than it is like a government employee, and that since government agencies are immune from *Bivens* actions, it must be as well. But the equation that CSC seeks to draw between a private corporation that contracts with the government and a government agency itself is flawed at its core. In arguing that it is like a federal agency, CSC relies primarily on *FDIC v. Meyer*, 510 U.S. 471 (1994). *Meyer* recognized that no *Bivens* action lies against a federal agency. Although *Meyer* held that the FDIC's sue-and-be-sued clause waived sovereign immunity, the justifications for the FDIC's exemption from *Bivens* also form the basis for other agencies' sovereign immunity protection. None of these justifications apply to CSC.

Three reasons underlay the Court's decision. First, *Bivens* was premised on the assumption that sovereign immunity barred suits directly against federal agencies. "[W]e implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available." *Meyer*, 510 U.S. at 485 (emphasis in original). That reasoning is clearly not implicated here — *Bivens* did not rest on any assumptions about private corporations' liability. *Meyer*'s discussion of the FDIC treated it as indistinguishable from any other federal agency for *Bivens* purposes. CSC's argument that

it is "strikingly similar" to the FDIC is based more on wishful thinking than on logic. Most fundamentally, it ignores the FDIC's status as an instrumentality of the federal government. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 394 (1995); *cf.* 5 U.S.C. § 552(f) (Freedom of Information Act defines "agency" to include federal government corporations). Like Amtrak, which in *Lebron* was held to be a government agency for constitutional purposes, the FDIC was created by Congress to further federal governmental goals, and a majority of its directors are appointed to the FDIC by the President with the advice and consent of the Senate. 12 U.S.C. §§ 1811(a), 1812(a)(1); United States GAO, *Government Corporations: A Profile of Existing Government Corporations* 68-69 (Dec. 1995). The other two directors are the Comptroller of the Currency and the Director of the Office of Thrift Supervision, 12 U.S.C. § 1812(a)(1), who are appointed to those positions by the President with the advice and consent of the Senate. *Id.* §§ 2, 1462a(c)(1). CSC, in contrast, was not established by the federal government, was not created to further governmental goals, is not directed by government appointees, and is not subject to federal control. It performs contracts not only for the federal government but also for state and local governments. CSC Form 10K at 7-10. Surely it is not an agency of each of these governments. *Cf. Logue v. United States*, 412 U.S. 521, 526 (1973) (county jail housing federal prisoner was not a federal agency). CSC is a private corporation that serves its private shareholders' interests.

Second, Meyer wanted to sue the agency because the officer defendant had raised a qualified immunity defense. The Court feared that allowing an end-run around immunity defenses would discourage plaintiffs from suing federal officers. *Meyer*, 510 U.S. at 485. That argument is also inapposite here because the Court has held that qualified immunity is not a defense for guards employed by private prisons. *McKnight*, 521 U.S. at

412. Furthermore, whether a plaintiff sues CSC or its employees, the corporation is responsible for both litigation costs and any damages award because it has assumed that liability by contract. As explained below, suits brought against CSC can be expected to deter constitutional violations by CSC employees. *Bivens*' deterrent function thus would be enhanced rather than undercut by allowing *Bivens* suits against corporations operating federal prisons.

Third, *Meyer* found a "'special factor[] counselling hesitation' in the creation of a damages remedy" in the "potentially enormous financial burden for the Federal Government" if direct damages actions were allowed against federal agencies. 510 U.S. at 486. This is a central concern driving federal sovereign immunity. It does not arise here where any financial effect on the federal government is indirect at best and where the government has already shielded itself from liability by requiring its prison contractors to carry liability insurance. *Meyer* is the only case in which this Court cited *Bivens*' financial impact on the federal government as a "special factor," because there, a federal agency would have been directly liable for any damages award. The idea that the government is paying the *Bivens* defendant who will eventually pay any damages judgment is hardly novel or shocking; the government indemnifies its employees against litigation arising out of conduct within the scope of their employment, including garden-variety *Bivens* litigation. 28 C.F.R. § 50.15; Pet. Br. at 10-11 n.8. CSC is required to insure itself. BOP Statement of Work at 8. Yet federal employees' exposure to *Bivens* suits has never been considered a direct drain on the federal fisc, even though the judgments ultimately are paid from the U.S. Treasury. Any damages awarded to Mr. Malesko would be paid by CSC's insurers. It can have no effect on the United States unless CSC tries to raise its prices when it seeks to renew its contracts — and even then, a competitor might outbid CSC.

Furthermore, the indirect impact that corporate liability might have on the federal government has never been held to insulate private prisons from state tort law.

2. Like a Federal Employee, CSC Is an Appropriate *Bivens* Defendant.

Like a federal employee, CSC is an entity with which a federal agency has contracted and which it has invested with federal power in exchange for CSC's performance of certain core governmental functions. *Carlson v. Green* establishes that even high-level federal employees, such as the BOP Director, can be held liable for constitutional violations that they did not directly commit but that they were responsible for preventing. CSC is in exactly this position. BOP — the relevant federal agency here — has hired CSC to perform a core government function with limited federal supervision. The heart of CSC's responsibility is to supervise its employees effectively to ensure that order is maintained without infringing the constitutional rights of inmates.

Green concerned the death, while in federal custody, of Marie Green's son Joseph Jones Jr. When Jones entered the federal prison system, he was diagnosed with chronic asthma; at one point during his incarceration, his condition required an eight-day hospital stay. After he left the hospital, prison officials failed to provide Jones with his prescribed medication. When he suffered a severe asthma attack, Jones received no competent medical care for more than eight hours. An unlicensed nurse injected him twice with Thorazine, a contra-indicated drug, and Jones died of respiratory arrest half an hour after the second injection. *Green*, 446 U.S. at 16 n.1; 581 F.2d 669, 671 (7th Cir. 1978).

As administratrix of her son's estate, Ms. Green brought his Eighth Amendment *Bivens* claim against Carlson, the BOP Director, the chief medical officer responsible for the prison medical services, and several other federal officials. 446 U.S. at 16; *see also* 581 F.2d at 671, 676. This Court held that Green was entitled to pursue the claim against the federal officials, and emphasized the deterrence aspect of the *Bivens* remedy. Of course, it was highly unlikely that the BOP Director had any role in Jones's case, let alone that he actively deprived Jones of medical care or actually administered the Thorazine. There was no allegation that the prison's chief medical officer was even present during these events. But either of them could have imposed procedures that would have prevented Jones's death, and each had the authority to prevent similar deaths in the future. From a conceptual standpoint, CSC plays the same kind of role as the defendants in *Green*. CSC decides whether to withhold prescribed medication; it decides whether prisoners' medical needs will be accommodated or ignored; and it decides how to train and equip its employees. Here, Mr. Malesko alleges that CSC denied him his medication and refused to accommodate his serious illness, as it could have done by allowing him to use the elevator or housing him on a lower floor. Both the BOP Director and CSC are amenable to suit under *Bivens* because both wield federal power and both control how federal power is used by others.

CSC argues that it is unfair for Mr. Malesko's *Bivens* cause of action to extend to CSC as well as its guards, when a prisoner incarcerated in a government-run prison may sue only the guards and not BOP. This argument ignores several points. First, it ignores the point made earlier in this brief: namely, that the reach of *Bivens* is limited only by sovereign immunity, and that BOP is immune from *Bivens* not because it is a corporation (it is not), but because as part of the United States, it is absolutely immune. Second, from a more practical standpoint,

the CSC's argument studiously overlooks the fact that the United States government by and large indemnifies its employees in *Bivens* actions. Thus, when an inmate brings a *Bivens* action against BOP employees, the United States is a real party in interest, providing attorneys to represent the defendant and providing money to pay any adverse judgment. Third, CSC ignores the fact that Mr. Malesko could presumably sue CSC's chief executive officer, just as an inmate in a government-run prison could sue the director of BOP. Since the government requires CSC to assume responsibility for — and insure against — its employees' liability, it is a sterile formality to recognize Mr. Malesko's cause of action against CSC's CEO but not against CSC itself. The arcane distinction that CSC urges on this Court is nothing more than a pleading trap intended to protect private prisons from meritorious claims. *Cf. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (holding that the liberal system of "notice pleading" established by the Federal Rules of Civil Procedure bars the imposition of heightened pleading requirements in section 1983 cases). Fourth, CSC itself urges an anomalous result by asking this Court to insulate CSC from constitutional claims brought by inmates held under contract with BOP when CSC clearly is subject to liability in constitutional claims brought by inmates held under state contracts. Indeed, CSC holds federal and state inmates in the same facilities. CSC Form 10K at 7-10. It cuts against the grain of this Court's rulings to argue that CSC's federal prisoners are limited to state tort remedies when its state prisoners may invoke the federal Constitution. *Butz v. Economou*, 438 U.S. 478, 501 (1978).

In terms of its motivation, and therefore the incentives needed to control it, a corporation is much more like a federal employee than like an agency. Each contracts with the government to provide services at a given price. However, each

is ultimately responsible only to itself. If anything, a federal employee is more like a federal agency than is a private corporation. Unlike a federal employee, a contracting corporation can profit by cutting corners. It can save money by hiring fewer guards, offering lower wages, failing to train its employees, or withholding goods and services from inmates. Government employees are subject to a level of supervision by their superiors that the government cannot hope to match in monitoring its contractors. Brief of Amicus Curiae the Legal Aid Society in Support of Respondent at 25-27. Agencies' budgets — and therefore staffs — are generally subject to direct Congressional control; private prisons submit bids for given time periods and are thereafter free to arrange their finances as they like.

Requiring CSC to pay for the harm it commits is the best way to discourage future harm. BOP recognizes this reality by requiring each contracting prison, not individual guards, to assume responsibility for "all litigation, including the cost of litigation, brought against it, its employees or agents for alleged acts or omissions." BOP Statement of Work at 5. This requirement ends any doubt that CSC bears liability even where the nominal defendant is a CSC employee rather than the corporation itself. The requirement is grounded in four realities: (a) that CSC is in a position to control the way its employees perform their duties; (b) that CSC's policies or lack of policies may be responsible for injuries inflicted on inmates; (c) that the employees themselves may lack the assets to pay the damages awarded against them; and (d) that individual employees may be impossible to identify or find.

First, as a private corporation, CSC has free rein to control its employees. *Cf. McKnight*, 521 U.S. at 410 (noting private prison's "freedom to respond to ... market pressures through rewards and penalties that operate directly upon its

employees"). It may hire them at will, discipline them, reduce their pay, and fire them as it pleases. CSC can give superior employees promotions, raises, or extra leave. Common law courts have long recognized the significance of an employer's ability to control its employees; it is one of the underpinnings of the *respondeat superior* doctrine. *See, e.g., Riviello v. Waldron*, 47 N.Y.2d 297, 302 (1979); W. Page Keeton *et al., Prosser & Keeton on Torts* 500 (5th ed. 1984). BOP also exploits this economic reality in an effort to achieve better control over private prisons. It limits subcontracting to 25% of contract requirements "to create a uniform composition of services under the control and supervision of the facility director." BOP Statement of Work at 6-7.

As this Court has recognized, things are very different in the public sector. *McKnight*, 521 U.S. at 410 ("government employees typically act within a *different* system") (emphasis in original). Government employees ultimately report to elected officials. Federal civil service rules sharply restrict agencies' freedom either to punish or to reward their employees. *Id.* at 410-11. In contrast to private employees, individual government employees are therefore less likely to be deterred from misconduct by damages awards against their agencies. Conversely, the threat of liability is less likely to produce overly timid job performance by the employees of private corporations, both because private employment laws are more flexible and because financial considerations act as a counterbalance. *Id.*

Second, CSC's policies, rather than individual fault, may be the cause of a plaintiff's injuries. Particularly if the cause is a systemic problem such as a failure to train or a failure to address a recurring situation, there may be no one individual responsible for the deprivation. Suppose that Mr. Malesko had routinely been denied his medication. It is far from clear that, in such a case, he could point to any particular individuals within

a corporation who were responsible. It may that a single guard withheld the medication for vindictive reasons; it may be that the corporation decided to save money by providing medication to inmates only when they complained or agreed to pay for it themselves. Similarly, suppose that Mr. Malesko had routinely been denied his right to consult with counsel. Again, the denial might be the act of a single guard or it might be the result of a corporate policy to curtail inmate access to their attorneys. In these circumstances, the corporation, not any one individual, is responsible for injuries that may be caused by harmful policies or systemic failings. The *Bivens* action is meant to deter recurring, systemic constitutional violations just as much as unpredictable individual instances of constitutional violations. Only holding the corporation liable achieves this purpose. *Cf. Owen v. City of Independence*, 445 U.S. 622 (1980); *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978).

Third, an individual defendant may well be unable to pay any substantial damages judgment awarded against him. The career of a prison guard, especially in a private prison, is not particularly lucrative. It is partially for that reason, we assume, that BOP has required in its contract with CSC that CSC pay any judgments entered against its employees.

Fourth, it may be impossible for the plaintiff to identify or locate an individual defendant. As the dismissal of Mr. Malesko's claim against Jorge Urena demonstrates, Pet. App. 17a-18a, a plaintiff may be unable to identify his guards before the limitation period expires. Private prisons have no reason to disclose guards' identities to prisoners, and several reasons not to. By hiding the identities of their guards, prisons may avoid litigation against the guards, protect the guards from retaliation by disgruntled prisoners or their families, and discourage improper inmate-guard relationships. *See Sellers v. United States*, 902 F.2d 598, 602 (7th Cir. 1990) (explaining why

prisoners cannot be expected to serve BOP guards with process without assistance from the U.S. Marshals Service). However, hiding the defendants substantially impairs the value of the *Bivens* suit both as a deterrent and as a remedy. Continuing to allow suits directly against the corporation is the obvious solution. When the plaintiff cannot find an individual who is the sole defendant, there is no deterrent effect at all, let alone any compensation to the plaintiff. BOP addresses the problem by requiring the corporation to assume responsibility for litigation against its employees. It would be an empty formalism to require the plaintiff to sue an individual employee rather than the corporation that could have prevented the injury, that will conduct the defense litigation, and that will pay for the injury in the end.

Citing *Meyer*, 510 U.S. at 485, CSC argues that finding liability here will actually undercut the deterrent effect of the *Bivens* remedy by encouraging plaintiffs to sue corporations rather than their employees. This argument defies logic, stretches *Meyer* beyond its limits, and ignores cases such as *Carlson v. Green* in which plaintiffs pursued their claims against the offending officers' superiors and *Owen v. Independence*, which acknowledged the deterrent effect of entity liability in the section 1983 context. For the reasons just given, CSC's liability is likely to affect its employees' behavior as much as, if not more than, individual employee liability would. In either case, CSC's insurers will pay the damages and CSC will have an incentive to control its employees' behavior to minimize its insurance costs. *See also* Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 Yale L.J. 857 (1984); Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo. L.J. 65, 76 (1999). *Meyer* was concerned that agency liability would discourage plaintiffs from suing individual officers, because officers but not federal agencies would have a

qualified immunity defense. But *Richardson v. McKnight* established that private prison guards do not have qualified immunity from section 1983 lawsuits, and CSC does not, because it cannot, argue that a qualified immunity defense would be available to private prison guards in a *Bivens* action. Therefore, *Meyer*'s concerns about diminished deterrence can apply only to federal agencies.

3. Because Private Corporations Are Liable for Their Constitutional Torts Under Section 1983, They Should Also Be Liable Under *Bivens*.

The federal courts have long looked to 42 U.S.C. § 1983 as a parallel to the *Bivens* action. Enacted in 1871, section 1983 creates a cause of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." This broad language has been given detailed meaning by the federal courts, which have often recognized its similarity to *Bivens*, because both actions enforce the federal Constitution. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 934 & n.17 (1982) (discussing purpose of section 1983); *Bivens*, 403 U.S. 388. Congress did not need to enact a federal parallel to section 1983 because federal officers could always obtain a federal forum by removing their cases to federal court. Because there was no general federal question jurisdiction in 1871, however, section 1983 was needed to ensure a federal forum for the vindication of federal rights when state officers violated those rights. *Economou*, 438 U.S. at 502 n.30.

In case after case, this Court and the lower federal courts have drawn on the parallel purposes of the two causes of

action to elaborate the scope and requirements of each. In *Wilson v. Layne*, 526 U.S. 603 (1999), for example, federal and state officers acted together; accordingly, this Court applied a single analysis to the *Bivens* and section 1983 claims. *See also, e.g., Graham v. Connor*, 490 U.S. 386, 394 n.9 (1989) (analysis of excessive force claims); *Carlson v. Green*, 446 U.S. at 21 n.6, 22 (availability of punitive damages); *Economou*, 438 U.S. at 495-96, 501 ("Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers.") Contrary to the government's suggestion, these parallels have not been limited to questions of qualified immunity.

It is well-established, and CSC concedes, that a plaintiff may sue a private corporation in a section 1983 action. *Lugar*, 457 U.S. 922; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).[5] Just as the Court focuses on the "under color of state law" requirement in modern section 1983 cases such as *Lugar*, *Bivens* focuses on the abuse of federal authority and not the individual characteristics of the defendant. *Bivens*, 403 U.S. at 392. CSC's position is that if a state and federal prisoner confined in the same facility suffer identical injuries under the same unconstitutional policy, only the *state* prisoner will be able to sue CSC under the federal Constitution in federal court. The *federal* prisoner's only recourse against CSC – if, indeed, any is available – will be to sue CSC under state law. Nothing in section 1983 or the Constitution can justify this absurd result.

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[5] "[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 687 (1978); *accord Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394 (1886) (holding that corporation is a "person" under section 1983).

"[T]he 'constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression." *Green*, 446 U.S. at 22. Dismissing this case based on the defendant's corporate status would vitiate *Bivens'* purposes. It would create a gulf between *Bivens* and section 1983 that cannot be justified on any policy grounds, much less the key policies underlying the two causes of action: deterrence of constitutional wrongdoing and compensation of its victims.

D. State Law Does Not Assure Enforcement of the Federal Constitution.

CSC seeks to resuscitate the argument rejected in *Bivens*: namely, that state tort law adequately protects rights guaranteed by the federal constitution against invasion by federal officers, obviating the need for a federal cause of action. Not so. The bedrock assumption underlying *Bivens* and all its progeny is that only Congress can provide an adequate alternative remedy, because only Congress can guarantee federal rights as effectively as the federal courts. State tort law is no substitute for the federal Constitution. Congress has recognized this principle by acquiescing in this Court's twenty-year-old conclusion in *Green* that the Federal Tort Claims Act does not displace *Bivens*, and by authorizing claims against federal prison guards under both *Bivens* and state law for intentional torts such as assault, battery, and false imprisonment. 28 U.S.C. §§ 2679(b), 2680(h).

State law addresses matters of state, not federal, concern, and has nothing to do with the exercise of federal power. State tort law does not have any necessary relationship to the federal Constitution, and therefore cannot deter those who violate the Constitution or compensate their victims. It is focused instead on regulating relations among individuals. "The

interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile." *Bivens*, 403 U.S. at 394 (discussing cases); *cf. Carey v. Piphus*, 435 U.S. 247, 258 (1978) ("In other cases, the interests protected by a constitutional right may not also be protected by an analogous branch of the common law of torts.... The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action.").

Various types of wrongdoing in private prisons might give rise to a *Bivens* claim but not to a state tort claim. *See, e.g., Brown v. United States*, 653 F.2d 196 (5th Cir. Unit A 1981) (affirming dismissal of malicious prosecution claim and noting that Fourth and Fifth Amendment claims are not part of state law). The Equal Protection Clause, for example, was enacted specifically because the common law provided no remedy against government-sponsored discrimination. Thus, even if racially-motivated death threats at gunpoint by a prison guard would not constitute assault under state law, they may violate the Due Process and Equal Protection Clauses. *Burton v. Livingston*, 791 F.2d 97, 100-01 (8th Cir. 1986) (section 1983 case). Federal law or federal officials might purport to authorize unconstitutional acts, immunizing them against state tort claims. *Brown v. Nationsbank*, 188 F.3d 579, 588-89 (5th Cir. 1999) (Supremacy Clause shields private defendants acting under FBI direction from state law claims); *Burton-Bey v. United States*, (No. 96-3241) 1996 U.S. App. LEXIS 29372 (10th Cir. Nov. 12, 1996) (affirming dismissal of FTCA claim where only "*unauthorized* assumption and exercise of the right of ownership" was actionable under state law, and BOP regulations authorized the seizure at issue) (emphasis

added). Of course, such "authorization" would not shield the defendants from a *Bivens* claim if their acts were unconstitutional. Other claims arise out of unique features of the prison context, making it difficult to imagine a parallel common law claim. *Del Raine v. Williford*, 32 F.3d 1024, 1031-38 (7th Cir. 1994) (confinement in bitterly cold cell can give rise to Eighth Amendment *Bivens* claim); *Kikimura v. Turner*, 28 F.3d 592, 597-99 (7th Cir. 1994) (warden violated prisoner's First Amendment right to receive correspondence written in Japanese).

Nor can the evolution of state tort law result in a uniform interpretation of the federal Constitution. As this Court recently explained, *Bivens* and section 1983 cases provide federal courts with a valuable opportunity to clarify constitutional standards. This clarification function is so important that it justifies the courts' deciding constitutional issues before reaching the question of qualified immunity. *Wilson*, 526 U.S. at 609.

Moreover, state law does not guarantee the procedural protections needed to safeguard constitutional rights. Most importantly, the Seventh Amendment applies in *Bivens* actions, *Green*, 446 U.S. at 22-23, but does not apply to state court actions, *Walker v. Sauvinet*, 92 U.S. (2 Otto.) 90, 92-93 (1875).[6] "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim

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[6] Of course, Congress could create an alternative remedy that does not require trial by jury, but such a remedy would have to be "an equally effective substitute" for the *Bivens* action, which includes the federal court jury guarantee. *Bush*, 462 U.S. at 378.

of the sovereign, or, it might be added, to that of the judiciary." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting). That federal right is an important element of the *Bivens* action and while states generally afford a right to trial by jury, the federal Constitution does not require them to do so.

Individual states also have their own causes of actions and procedural rules, making state tort law far from uniform. For example, negligent conduct may give rise to an assault claim in Connecticut, *Alteiri v. Colasso*, 362 A.2d 798 (Conn. 1975), or Alabama, *Honeycutt v. Louis Pizitz Dry Goods Co.*, 180 So. 91 (Ala. 1938), but not in Rhode Island, *Baran v. Silverman*, 83 A. 263 (R.I. 1912), or Mississippi, *Webb v. Jackson*, 583 So.2d 946 (Miss. 1991). *See also, e.g., Hayes v. Cambra*, (No. 99-15023) 1999 U.S. App. LEXIS 30103 (9th Cir. Nov. 15, 1999) (section 1983 retaliation claim remanded for reconsideration of sovereign immunity, but dismissal of state law claims affirmed for failure to file claim with a state agency). The enforcement of federal rights should be uniform, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984); *Green*, 446 U.S. at 25, especially when those who invoke federal law are likely to file complaints *pro se* and may well be incarcerated against their will in a distant and unfamiliar state. In *Green*, for example, the state law claims were barred by Indiana's law of survivorship, but this Court held that federal law governs survivorship in the *Bivens* action. 446 U.S. at 25.

Finally and most importantly, states are free at any time to change or eliminate their own tort law, or to restrict tort remedies, yet the Supremacy Clause forbids state interference with federal rights. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). The federal Constitution can be vindicated only in an action intended to enforce it: one under *Bivens* or section 1983. In sum, one teaching pervades *Bivens*

and its progeny: When federal power is used to violate constitutional rights, the victim must be able to seek damages for that violation in federal court.

E. *Bivens*' Two Exceptions Are Narrow, and Neither Applies Here.

This Court has decided only a handful of cases concerning *Bivens*' scope. As explained above, *Bivens*' progeny establish that Fifth and Eighth Amendment claims are cognizable under *Bivens* and that the Federal Tort Claims Act does not displace the *Bivens* cause of action. When federal authority has been used to violate constitutional rights, the victim can bring a *Bivens* action unless Congress has enacted an equally effective substitute remedy or there are special factors counseling hesitation in the absence of Congressional action. 403 U.S. at 396-97. This Court has never found a Congressional remedy to be an equally effective substitute for *Bivens*, and there is none even arguably applicable here. This Court has found "special factor[s] counseling hesitation" only in a few exceptional cases.

Two pairs of cases illustrate the stringency of *Bivens*' "special factor" standard. In *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669 (1987), this Court expanded the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), to bar *Bivens* actions by military personnel. In *Chappell*, enlisted Navy personnel sought to bring a damages action against their superior officers, but this Court held that "[t]aken together," the "unique disciplinary structure of the [m]ilitary" and Congress' control over military matters constituted "'special factors'" barring a *Bivens* action by soldiers against their superior officers. 462 U.S. at 304. *Chappell* noted that the military's needs were important enough to override the arguably plain language of the Federal Tort Claims Act in *Feres* itself. *Id.* at 299. In *Stanley*, a bare

majority of this Court held that a military exception parallel to the *Feres* doctrine barred a *Bivens* action against various federal officers arising out of LSD experimentation on unconsenting soldiers. 438 U.S. at 683-84. *Feres*, *Chappell*, and *Stanley* are simply inapplicable to this civilian case, but they do illustrate the strength of the federal interest needed to overcome the presumption that a *Bivens* action is available. "In every respect the military is, as this Court has recognized, 'a specialized society,'" not necessarily subject to civilian rules. *United States v. Johnson*, 481 U.S. 681, 690-91 (1987).

Bush v. Lucas, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988), addressed statutory schemes that Congress created to adjudicate monetary claims against the government. *Bush* concerned civil service employees who were allegedly fired in violation of their First Amendment rights, while *Chilicky* arose out of systemic processing problems with social security benefits. The statutory remedy in each case included administrative adjudication of the aggrieved individuals' claims, judicial review, and full payment of the unlawfully withheld monies to the complainants. *Bush*, 462 U.S. at 386-88; *Chilicky*, 487 U.S. at 424-25. In both cases, Congress had addressed the specific problem at issue and, although the statutory remedies were in some respects unsatisfactory to the plaintiffs, they did constitute "special factors counseling hesitation."

It is undisputed that Mr. Malesko has no access to any statutory remedy that could displace a *Bivens* suit. The alternative remedies to which CSC alludes were not created by Congress and do not address his situation. BOP's complaint policy is the equivalent of a suggestion box: There is no provision for binding dispute resolution, let alone judicial review, and no opportunity for prisoners to obtain damages. 28 C.F.R. § 542.10 *et seq.* CSC's suggestion that Mr. Malesko

might obtain an injunction is likewise unrealistic. Even if injunctive relief would be available to a prisoner who had just suffered Mr. Malesko's injuries, now that Mr. Malesko has been released from federal custody, he lacks standing to seek an injunction in federal court. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). An injunction simply would not remedy his injuries; in Justice Harlan's words, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

The last "special factor" that CSC identifies is a broad pro-privatization policy on the part of Congress. Here CSC overstates its case. Most of the statutes CSC cites leave it to the agency's discretion whether to use contractors or not. *See generally* statutes cited in Pet. Br. at 28-29 n.25. But even if Congress did favor privatization, this argument utterly fails to distinguish *Bivens* or any of its progeny. Congress clearly has a pro-civil-service policy; federal agencies have required staff since their creation. The federal courts themselves have recognized the threat that liability may pose to "principled and fearless decision-making" by government employees. *Wood v. Strickland*, 420 U.S. 308, 319 (1975) (internal quotation marks and citation omitted). Yet *Bivens* was conceived as a remedy against federal officers.

Nor does the fact that Congress pursues a particular end mean that it or those exercising federal authority may ignore the Constitution on the way to that end. Indeed, the federal government's asserted move from performing core governmental functions itself to contracting out those functions makes it all the more important that contractors be at least as accountable as federal employees. Brief for the U.S. as Amicus Curiae Supporting Respondent at 21-24, *Richardson v. McKnight*, 521 U.S. 399. For decades, the federal courts of appeals have explicitly held or assumed that private corporations can be held liable under *Bivens*. *See, e.g.*, *Hammons v. Norfolk*

Southern Corp., 156 F.3d 701 (6th Cir. 1998); *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987); *Gerena v. Puerto Rico Legal Serv., Inc.*, 697 F.2d 447 (1st Cir. 1983); *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219 (5th Cir. 1982); *Ginn v. Mathews*, 533 F.2d 477 (9th Cir.1976); *Yiamouyiannis v. Chemical Abstracts Serv.*, 521 F.2d 1392 (6th Cir. 1975) (per curiam). Yet nothing in the array of statutes CSC cites indicates any congressional intent even to address constitutional violations by private contractors, let alone to limit contractors' liability for their constitutional torts. Congress has enacted extensive laws authorizing privatization, yet for over twenty-five years has chosen not to immunize private corporations from liability for their unconstitutional abuses of federal power. This Court should not override Congress's judgment.

The cases elaborating *Bivens*' exceptions only demonstrate the substantial congressional activity or federal interest needed to displace the *Bivens* action. There is no such activity or interest here.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be affirmed, and this case remanded to determine whether petitioner violated John E. Malesko's constitutional rights.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CORRECTIONAL SERVICES CORPORATION,
Petitioner,

v.

JOHN E. MALESKO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTRODUCTION

The issue presented in this case is not, as Respondent and his *amici* would have it, whether privatization of federal prisons is good policy or whether Correctional Services Corporation ("CSC") is entitled to sovereign immunity. The issue is whether the implied cause of action against federal officers for damages arising from constitutional violations, see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be extended to private entities acting under color of federal law. CSC and the Government showed in their opening briefs that this Court should not do so because such an extension would serve neither of the purposes underlying *Bivens*—to wit, it would neither enhance deterrence of constitutional violations by individual officers nor provide a remedy where none otherwise exists.

Indeed, the logic of this Court's decision in *FDIC* v. *Meyer*, 510 U.S. 471 (1994), simply cannot accommodate the extension of *Bivens* to private entities. *Meyer* makes clear that the core purpose of *Bivens* is the deterrence not of corporate entities, but of individual actors—*i.e.*, the people who set and implement policies—and further that a *Bivens* remedy is appropriate only where a plaintiff lacks any other remedy. Where, as here, it has been assumed that the plaintiff could have brought a *Bivens*-type action against the CSC employees who allegedly injured him by creating, implementing, or violating a CSC policy, the requisite deterrence of and remedy for constitutional violations already exists, and *Bivens* should not be extended.

The fundamental difference between the parties in this case is found in their entirely distinct views of the role of the *Bivens* action. CSC and the Government contend that a *Bivens* action is a gap-filler, a judicially created solution for the problematic situation created when there is no deterrence of, nor any damages remedy for, constitutional violations

committed by individual federal officers. Respondent and his *amici* treat *Bivens* as a full-blown statutory scheme, akin to Section 1983, establishing and implementing remedies for any and all constitutional violations under color of federal law. But precisely because the *Bivens* action is a judicial—not a congressional—creation, it extends only as far as necessary to fill the gaps identified by this Court in the line of cases following *Bivens*.

Even where a gap exists, a *Bivens* action will be implied only if there are no "'special factors'" that counsel against doing so. *Meyer*, 510 U.S. at 486. CSC and the Government showed that "[r]ecognizing an additional *Bivens* damages action directly against correctional corporations in this context has the potential of impeding the BOP's [Bureau of Prisons'] implementation of important correctional programs" and would place an additional burden on federal fiscal interests. Gov't Br. 10, 26-28. And CSC's and the Government's view has the added virtue of treating federal prisoners consistently: Federal prisoners in facilities operated by either the BOP or a private contractor may bring *Bivens* actions against individuals acting under color of federal law, but not against the entity holding the prisoners. By contrast, Respondent's proposed extension would grant federal prisoners in private, but not public, facilities a *Bivens* action against the entity holding them.

CSC's and the Government's approach best comports with this Court's "cautious[]" response to proposals for new extensions of *Bivens*. *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). Exercise of such caution is fully warranted here. The decision below, extending *Bivens* to a context in which none of its purposes would be served, should be reversed.

ARGUMENT

I. EXTENDING *BIVENS* TO PRIVATE ENTITIES WOULD UNDERMINE, NOT ADVANCE, THE PURPOSES OF *BIVENS*.

As demonstrated in CSC's and the Government's opening briefs, the cause of action for damages created in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), only will be extended where it *both* (i) would deter an individual officer by exposing him personally to the direct threat of litigation and liability if he unconstitutionally abuses his federal authority *and* (ii) would provide damages for a constitutional violation that lacks an alternative remedy. See Pet. Br. 8-18; Gov't Br. 18-26. Enlarging *Bivens* to include actions against private entities such as CSC would serve neither of these purposes.

A. Extending *Bivens* To Private Entities Will Undermine Its Core Deterrence Rationale.

1. Respondent posits that "[t]he only limit this Court has recognized on *Bivens*' reach is for . . . entities entitled to invoke absolute sovereign immunity." Resp. Br. 7. This contention does not withstand even cursory scrutiny. As an initial matter, as is plain from its opening brief, CSC does not claim (either "overtly" or covertly) that it is entitled to sovereign immunity. *Id.* at 16. More importantly, this Court has rejected the claim, repeated throughout Respondent's brief, see *id.* at 4, 7-8, 10, 12-18, that the scope of *Bivens* is in any way linked to the scope of sovereign immunity. Indeed, in *Meyer*, the Court rejected the lower court's "conflat[ion]" of the sovereign immunity and *Bivens* analyses, terming them "two 'analytically distinct' inquiries." *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994). As such, courts consider separately whether sovereign immunity precludes liability and whether *Bivens* "provides an avenue for relief." *Id.* As the *Meyer* Court unanimously held, a federal corporation, the Federal Deposit Insurance Corporation ("FDIC")—*which had no*

sovereign immunity—still was not amenable to a *Bivens* suit. *Id.* at 486. The question whether CSC is entitled to sovereign immunity is simply irrelevant to whether extending *Bivens* is appropriate given its logic and purpose and the presence of special factors counselling hesitation. *Id.* at 483-86.

2. As the Court unanimously held in *Meyer*, "the purpose of *Bivens* is to deter *the officer*." *Id.* at 485 (emphasis in original). Deterrence, in the *Bivens* sense, operates on the behavior and motivations of an individual, natural person, not on an entity or artificial person. See Pet. Br. 9-13. The quintessential *Bivens* defendant (indeed, the only *Bivens* defendant ever recognized by this Court), is an individual federal officer—either a line agent directly interacting with the public or an administrator directly setting an entity's policies.

The Court never has held that an entity—even one that enjoys no sovereign immunity (such as the FDIC in *Meyer*)—is amenable to a *Bivens* action. Contrary to Respondent's suggestion, the Court's distinction between individuals and entities is no "arcane" "pleading trap," Resp. Br. 29, but a core analytical distinction based on the purpose and logic of *Bivens* to deter and to fill a remedial gap. As shown in CSC's opening brief, deterrence in the *Bivens* sense specifically targets the threat and pains of litigation at those individuals who actually interact with, and set policies impacting, the public and who are directly responsible for unconstitutional conduct. Pet. Br. 9-13.[1]

3. As shown in CSC's opening brief and explained in *Meyer*, if entities were amenable to *Bivens*, these deterrent effects would be undermined. Pet. Br. 11-13; *Meyer*, 510

[1] Furthermore, Respondent and his *amici* ignore that the Court has held that *Bivens* deterrence is not undermined even where an individual officer has qualified immunity (or, as here, a possible good faith defense), is indemnified against constitutional torts, and is acting pursuant to an entity's policy. *See* Pet. Br. 10-11 & nn.7 & 8; *see FDIC* v. *Meyer*, 510 U.S. 471, 473, 474, 486 (1994).

U.S. at 485; cf. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) ("[A] damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a government employer."). Respondent does not dispute that entities are more attractive litigation targets. See 13 & n.12, *infra*. Thus, if *Bivens* liability were expanded, plaintiffs would tend to sue, and to enforce judgments against, entities to the exclusion of the individuals responsible for the unconstitutional conduct. In such a case, "the deterrent effects of the *Bivens* remedy would be lost." *Meyer*, 510 U.S. at 485. Deterrence in the *Bivens* sense is achieved by targeting individual officers to the exclusion of the employing entity.

4. Respondent and his *amici* assert that a *Bivens* action is necessary to cure systemic problems and to deter an entity from making and enforcing unconstitutional policies, but this contention fails. First, because plaintiffs can bring *Bivens* actions against individuals who directly make policy for federal entities and entities acting under color of federal law, it plainly is not necessary to have a *Bivens* action against the entity. See I.B., *infra*. In any event, there is no policy at issue here. Despite Respondent and his *amici*'s characterization, Respondent has not clearly pled that his injuries were caused by a CSC policy. To the contrary, Respondent concedes that CSC's policy was that, "because of his illness, Mr. Malesko was *allowed* to continue to use the elevator." Resp. Br. 1 (emphasis added). Subsequently, and in violation of this CSC policy, it was an individual CSC guard who "compelled Mr. Malesko to take the stairs to his room" despite being reminded that Respondent "was allowed to use the elevator." Resp. Br. 1-2.[2] But, even if this case squarely

[2] There is no allegation that CSC had any policy, or took any action, that precluded Respondent from obtaining his medication. J.A. 13; *see* Gov't Br. 6 n.3 (noting that "residents generally are responsible for the costs of their medical and dental care" except "'[i]n an emergency'") (quoting BOP, *Statement of Work for Community Corrections Center* 88

involved a CSC policy, it is axiomatic that corporations act only through their officers and agents. See Gov't Br. 21 n.11.

5. Respondent's and his *amici*'s suggestion that *Bivens* is necessary to deter the wrongdoing, and to provide proper oversight and accountability, of entities such as CSC overlooks the fact that there already are numerous mechanisms for ensuring direct and indirect scrutiny and oversight of entities. First, as discussed below, there are already appropriate judicial means to hold entities directly accountable in tort. See I.B., *infra*.

Second, entities such as CSC already are subject to "extensive" BOP "oversight and enforcement" including "contract monitoring and performance evaluation." Gov't Br. 25. In particular, CSC must comply with the BOP's voluminous *Statement of Work*, detailing numerous policies and standards designed to protect inmates. Indeed, CSC risks losing its contract if it does not meet these standards. Given that there are few, if any, alternative buyers besides the government, entities such as CSC have a powerful incentive to satisfy the BOP's standards. Moreover, the BOP remains under direct public scrutiny and political pressure to take care in monitoring entities, such as CSC.

Third, as a publicly traded company, CSC is subject to extensive and ongoing reporting requirements in the securities markets that provide broad disclosure to the public. See, *e.g.*, Resp. Br. 16, 22 (citing CSC's Form 10K). Moreover, a corporation is directly responsible to its shareholders, and would have difficulty attracting new investment and retaining current investment if its employees behave unconstitutionally, thereby subjecting them to substantial liability and the company to adverse publicity.

(Dec. 2000)) (alteration in original). Moreover, despite Respondent's new theory that CSC somehow "fail[ed] to train and supervise" its employees, Resp. Br. 4, he made no such allegation in his complaint.

Fourth, as is plain from Respondent's *amici*'s citation to newspaper accounts of alleged correctional abuses, there already is substantial media oversight and access to correctional facilities. This is particularly true at a Community Correctional Center, such as the facility at issue here, where inmates have substantial interaction with the outside world. See Gov't Br. 2-4.[3] Finally, plaintiffs always can bring a *Bivens* suit against the wrongdoing individual officer.

Accordingly, the opposition's unsupported assertion that it is somehow efficient for a profit-making entity such as CSC to cut constitutional corners, defies reality. Resp. Br. 22; ACLU Br. 4. Extending *Bivens* to entities such as CSC is neither necessary (nor sufficient) to deter unconstitutional conduct given the myriad mechanisms that already exist to ensure government and public oversight.[4]

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[3] Despite Respondent and his *amici*'s assertion that private facilities are inherently more troubled and more prone to constitutional violations than are their public counterparts, in fact, the same study cited by the Legal Aid Society of the City of New York ("LAS"), *see*, *e.g.*, LAS Br. 8, concludes that "private prisons operate much the same as public facilities," "function as well as publicly operated prisons," and tend to have "the same staffing patterns; provide the same levels of work, education, and counseling programs for inmates; and have the same rate of serious inmate misconduct as public facilities. The few credible impact studies show more similarities and fewer differences between the two methods of operation." Bureau of Justice Assistance, U.S. Dep't of Justice, *Emerging Issues on Privatized Prisons* ix, x, 59 (Feb. 2001). In sum, such comparisons "cannot be used to conclude that either a private or a public prison is superior to the other." *Id.* at 47.

[4] If anything, LAS's litany of "patterns of abuse" at various *State* entities, LAS Br. 11-16, which are amenable to Section 1983 liability, indicates that extending *Bivens* to entities would not solve the problems LAS identifies. LAS's submission simply substitutes sensationalism for legal analysis.

B. Plaintiffs In Respondent's Position Already Have Appropriate Alternative Remedies.

1. Although Respondent and his *amici* do not dispute that individual CSC officers are appropriate *Bivens* defendants, they virtually ignore these potential defendants in insisting that a *Bivens* remedy is needed against CSC.[5] This approach is not surprising. Just as the plaintiff in *Meyer* sought to sue the FDIC as an end run around the individual FDIC officer's qualified immunity, Respondent seeks to sue CSC because his *Bivens* claims against CSC's officers are time-barred.

Respondent's current inability to pursue *Bivens* claims against individual officers is the result of a self-inflicted wound. Indeed, Malesko waited until nearly three years following the incident, on the eve of the expiration of the statute of limitations, to bring suit and did not identify a particular officer until his amended complaint, nearly five years after the alleged incident.[6]

Accordingly, the difference between the parties is clear. CSC and the Government believe that a federal inmate held in a CSC facility should have the same rights as one held in a BOP facility: namely, the right to sue the individual rogue agent or policymaker directly responsible for an alleged constitutional violation, but not the entity. Respondent and his *amici*, by contrast, believe that the CSC inmate should

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[5] Respondent and the courts below have assumed that CSC's individual officers would be amenable to a *Bivens* suit. *See* Pet. Br. 13-14. CSC does not "ignore[] the fact that Mr. Malesko could presumably sue CSC's chief executive officer, just as an inmate in a government-run prison could sue the director of BOP." Resp. Br. 29. In fact, all involved in this case have *presumed* that *any* officer who directly violates the Constitution under color of federal law is amenable to a *Bivens* suit—as is the director of the BOP.

[6] Respondent does not challenge the holdings below that this belated attempt to name individual defendants was time-barred. Resp. Br. 2.

have an *additional* cause of action against the entity. There is no justification for that proposed disparity.[7]

2. Respondent's arguments about the potential difficulties of suing individuals, as opposed to entities, do not warrant creation of a *Bivens* action against entities. First, while individuals are more likely than entities to have "shallow pockets" or to be judgment proof, this phenomenon is equally likely with regard to public officers. In any event, as shown above, providing access to entities severely undermines the *Bivens* deterrence rationale (see I.A., *supra*).

Similarly, Respondent's claim that entities are more desirable litigation targets because they are easier to identify than individuals does not support an extension of *Bivens* to private entities. This claim, if true, would be equally problematic in the public context. In all cases, the proper course instead is to sue the individual wrongdoers as "John Does" and utilize ordinary discovery mechanisms, such as propounding interrogatories, to learn their identity.[8] A plaintiff also could utilize non-litigation mechanisms to seek the identity of an individual wrongdoer, such as making inquiries through the BOP's Administrative Remedy Program. See generally Pet. Br. 16-17 & n.16; Gov't Br. 24 & n.15.

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[7] Moreover, to the extent private correctional employees (as opposed to public correctional employees) may not be entitled to qualified immunity, if anything, a plaintiff such as Respondent would have a more effective *Bivens* remedy than his publicly held counterpart. *See* Pet. Br. 10 n.7; *Richardson* v. *McKnight*, 521 U.S. 399, 412 (1997); *but cf. id.* at 413 (limiting holding, noting "[t]he case does not involve a private individual . . . serving as an adjunct to government in an essential governmental activity, or acting under close official supervision"). In *Meyer*, by contrast, the individual officer was protected by qualified immunity, leaving that plaintiff with no practically effective *Bivens* remedy.

[8] Here, of course, Respondent brought a John Doe *Bivens* suit against individual officers but failed to utilize discovery to learn their names and to amend his complaint in a timely manner. *See* 8 & n.6, *supra*.

3. In addition to the assumed *Bivens* remedy against individual CSC officers, Respondent concedes that plaintiffs in his position have damages remedies under State law. See Resp. Br. 18-19, 36; Resp. Pet. Opp. 13. Although urging that only Congress and the federal courts can protect federal rights, Respondent does not show why available State remedies would be inadequate to provide the damages he seeks in this case.[9] Indeed, Respondent does not answer CSC's point that plaintiffs in his position likely will have an easier time prevailing (and recovering damages) under State law standards (*e.g.*, by showing negligence) than under heightened Eighth Amendment "'deliberate indifference'" standards. Pet. Br. 15 (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976)). In any event, federal inmates assigned by the BOP to private and public facilities generally may sue both individual officers and entities through State tort law or, for those in public facilities, through the analogous federal tort remedy under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq*. See Gov't Br. 11-12. These tort remedies, combined with *Bivens* remedies against individual officers, are adequate for *all* federal prisoners. *Id.*

4. Finally, as CSC has shown, many other mechanisms ensure oversight and accountability of entities. Pet. Br. 16-18. For example, the Court recently has emphasized the importance with which Congress views the Administrative Remedy Program at least as a vehicle to "produce administrative results that would satisfy at least some inmates" and a useful "filter [of] some frivolous claims." *Booth* v. *Churner*, — U.S. —, —, 121 S. Ct. 1819, 1823

[9] Despite Respondent's repeated citation to *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), and history as support for expanding *Bivens* here, there was no *Bivens* cause of action at all for nearly 170 years. Moreover, as shown in CSC's and the Government's opening briefs and below, the Court is properly reluctant to imply causes of action where Congress has not acted, unless certain rigorous conditions are met. *See* III., *infra*.

(2001) (holding that this process must be exhausted before seeking money damages under Section 1983).

Respondent is therefore left in the same position as the plaintiff in *Meyer*: he may sue the individual officer under *Bivens*, and he may pursue remedies against the institution in tort, but he may not sue the entity in a *Bivens* action. CSC's and the Government's position, unlike respondent's, treats all federal prisoners equally while properly promoting *Bivens*' deterrence and remedial purposes.

II. SPECIAL FACTORS COUNSEL AGAINST EXTENDING *BIVENS* TO PRIVATE ENTITIES.

Where "'special factors counsel[] hesitation,'" extending *Bivens* is "inappropriate even if such a remedy were consistent with *Bivens*," *FDIC* v. *Meyer*, 510 U.S. 471, 486 (1994), and regardless of "whether the laws currently on the books afford [a plaintiff] an 'adequate' federal remedy for his injuries," *United States* v. *Stanley*, 483 U.S. 669, 683 (1987). See Pet. Br. 18-31. The range of factors considered in this analysis is broad and context sensitive. *Id.* at 18-19. Extending *Bivens* here would injure at least two sets of interests within Congress's particular institutional competence by interfering with federal fiscal policy and by creating disparate treatment that is contrary to logic, equity, and congressional privatization policy. See *id.* at 20-31. Special factors are implicated in this case, and extending *Bivens* to private entities therefore would be inappropriate.

A. Expanding *Bivens* To Government Contractors Would Threaten Federal Fiscal Policy.

Interference with federal fiscal policy is a "special factor[] counseling hesitation."[10] *Bivens* v. *Six Unknown Agents of*

[10] Respondent's challenge to this conclusion is baffling. Resp. Br. 11. *Bivens* stated that interference with federal fiscal policy could be a "special factor[] counseling hesitation," 403 U.S. at 396, and *Meyer* relied on that factor in refusing to extend *Bivens* to the FDIC, 510 U.S. at 486.

Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971). With due respect for Congress's role in spending decisions, the Court rightly hesitates to distort public choice, directly *or* indirectly. Because extending *Bivens* to government contractors would impact the federal fisc, hesitation is warranted here. Pet. Br. 20-23; Gov't Br. 26.

1. Respondent argues that the Court should ignore the effect on the fisc caused by increased liability of government contractors because that impact would be indirect. But, this Court rejected this argument in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988). *Boyle* reflects the practical reality that if private entities are subjected to higher liability risks while providing services to the government, entities will either raise their prices or refuse to provide those services. *Id.* at 507. This, in turn, will affect the federal fisc, *i.e.*, by increasing the price that the government pays or by removing options for service. The harm to the federal fisc will be no less significant because it is indirect. See Pet. Br. 20-21 & n.17 (analyzing effect of increased government contractor liability on federal fisc).

2. Respondent's analysis also judges the effect that increased liability would have on the availability and cost of insurance. As CSC has explained, insurers (being rational actors) will require higher premiums for providing coverage to entities subject to increased risk of liability—and may require higher premiums for all affected entities in order to spread the risk. *Id.* at 21-22 & n.18. Thus, even cautious contractors would have higher insurance premiums, to be passed on to the government. Similarly, any liability that exceeds policy limits would likewise be passed on to the government.

3. The fact that CSC, like the government, may voluntarily[11] indemnify its employees is irrelevant. While

[11] In claiming that CSC is obligated to assume its employees' liability, Respondent overreads the BOP *Statement of Work*'s provision that "[t]he contractor shall be responsible for all litigation, including the cost of litigation, brought against it, its employees or agents for alleged acts or omissions." BOP, *Statement of Work for Community Corrections Center* 5 (Dec. 2000). Respondent asserts an obligation on CSC's part to indemnify its employees, but while the *Statement of Work* requires contractors to bear *litigation costs*, it never mentions *indemnification* or *assuming liability*.

arguing that indemnification means that CSC would suffer no additional financial pain from direct liability under *Bivens*, Respondent does not dispute that "it is well documented that corporations fare worse before juries than do individuals"—with increased risk of being found liable and, if found liable, of having larger damage awards assessed against them. See Gov't Br. 20 n.10. Indeed, this Court has acknowledged that corporations may be subject to unduly large verdicts as compared to individual defendants. See *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (plurality). In sum, permitting plaintiffs to sue private corporations under *Bivens* creates problems,[12] including undue risk of larger damages and attendant harm to federal fiscal policy, that counsel against extending *Bivens*.

B. Expanding *Bivens* Is Contrary To Logic, Equity, And Congressional Privatization Policy.

Contractors, such as CSC, share key attributes with the entity whose task they perform—here, the BOP—and with the FDIC, the entity at issue in *Meyer*. CSC does not, and need not, claim that private entities are *identical* to federal agencies or government corporations. Rather, CSC focuses on critical traits showing that CSC, the BOP, and the FDIC should have the same *Bivens* liability, as a matter of logic,

[12] Another consequence of the prejudice against corporations is that extending *Bivens* here would give plaintiffs "a significant incentive to bypass suit against—and thus diminish the deterrent effect on—the individual officer," Gov't Br. 21 n.10. *See also* I.A., *supra*; Pet. Br. 11-12.

equity, and policy. Thus, the Court should decline to extend *Bivens* to private entities such as CSC.

1. Private entities operating prisons on behalf of the BOP serve the same function as does the BOP and, "[t]o the extent those entities exercise federal authority, they exercise that authority on behalf of—they stand in the shoes of—the BOP itself in pursuit of the Bureau's penological mission." Gov't Br. 24-25; see Pet. Br. 24-25. This fact has three consequences. First, it is illogical and inequitable to analogize CSC to the BOP in deciding if it is engaging in federal action but not when deciding whether it should be subject to *Bivens* liability. Pet. Br. 24; *Kauffman* v. *Anglo-American Sch. of Sofia*, 28 F.3d 1223, 1226 (D.C. Cir. 1994). Second, it is equally illogical and inequitable to treat federal prisoners differently solely because they are held, not by the BOP, but by a private prison. Pet. Br. 26 n.21; Gov't Br. 23. Third, as shown by the Government, the BOP maintains "extensive administrative and contractual oversight" over private prisoner providers, thus "mak[ing] it particularly difficult to justify a differential rule for BOP-regulated and BOP-operated institutions." Gov't Br. 25. Private prison providers, including CSC, act as arms of the BOP and, like the BOP, should not be amenable to *Bivens*.

2. Respondent has not, and cannot, deny that at least three central points of similarity exist between federal government corporations, such as the FDIC, and government contractors, such as CSC: (1) each has a separate legal personality from the federal government; (2) much of each entity's funding comes from nonfederal sources; and (3) neither entity is protected by sovereign immunity. See Pet. Br. 26-27. Respondent lists various distinctions between CSC and the FDIC, see Resp. Br. 25, but each is irrelevant to this analysis.[13] For example, the fact that the President appoints

[13] Similarly, Respondent notes throughout his brief that private entities are not subject to the civil service rules—but ignores that government corporations, such as the FDIC, are not covered by most relevant civil service rules. *See* 5 U.S.C. § 2302(a)(2)(C)(i) (but barring retaliation against whistleblower covered by Section 2302(b)(9)).

members of the FDIC's board of directors does not affect the FDIC's financial situation or lack of sovereign immunity.

3. Respondent's assertion that CSC is "[l]ike a federal employee," Resp. Br. 27, is not convincing. This claim relies on an incorrect reading of *Carlson* v. *Green*, 446 U.S. 14 (1980). *Carlson* did not hold that the BOP director could be sued under *Bivens*, even if he or she did not "ha[ve] any role" in a wrong alleged by an inmate. Resp. Br. 28. Rather, *Carlson* involved a motion to dismiss on *jurisdictional* grounds, and the parties *agreed* that the plaintiff had stated a claim of deliberate indifference under the Eighth Amendment against *each* defendant. 446 U.S. at 16-18 & nn.1, 3. Thus, *Carlson* does not hold that a defendant may be liable under *Bivens* for a wrong in which the defendant had no role.[14] And *Carlson*, where the only defendants were officers, *id.* at 16, did not raise the issue of whether *entities* may be liable under *Bivens*. Every other premise of the analogy between CSC and a federal officer, as shown in our opening brief and in this brief, is similarly flawed.[15]

4. It is beyond cavil that Congress has an express policy in favor of privatization generally, and in favor of Community Correctional Centers such as those run by CSC in particular. See Pet. Br. 28-31; Gov't Br. 3-4, 27. Respondent and his

[14] While Respondent implies that *respondeat superior* is permissible under *Bivens*, every court of appeals that has addressed the issue has rejected such derivative liability. *See, e.g.*, *Ruiz Rivera* v. *Riley*, 209 F.3d 24, 28 (1st Cir. 2000) (collecting cases).

[15] These arguments include Respondent's emphasis on sovereign immunity, analysis of the role of civil service in *Bivens*, claim that the government requires CSC to indemnify its own employees, incorrect reading of deterrence under *Bivens*, and analogy between CSC-held federal prisoners and state prisoners. *See* Resp. Br. 28-34. This amalgam of flawed arguments cannot weaken the analogies between CSC, the BOP, and the FDIC, nor does it show that CSC is like an employee.

amici do not dispute the policy's existence, but instead, engage in an improper, irrelevant debate on its wisdom. Congress's manifest determination to privatize certain prison functions is a factor counselling hesitation in extending *Bivens* here. Respondent also asserts that, because Congress did not exempt private entities from *Bivens* liability in light of pre-*Meyer* lower court decisions assuming such liability, Congress must have intended for *Bivens* to apply here. But, legislative silence certainly does not indicate that "Congress has ratified holdings of some of the Courts of Appeals." *United States* v. *Wells*, 519 U.S. 482, 496 (1997) (It "'is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.'") (quoting *NLRB* v. *Plasterers' Local Union No. 79*, 404 U.S. 116, 129-30 (1971)).[16] See also Pet. Br. 8 n.5 (explaining that pre-*Meyer* cases are not good precedent for the claim that *Bivens* applies to private entities). Legislative silence is particularly suspect where, as here, it is unlikely that Congress even considered the question at hand.

5. Finally, Respondent ignores the impact that extending *Bivens* to private entities such as CSC will have on federal procurement policy in the prison setting. The government seeks to choose providers (public or private) based on which entity serves prisoners and society more effectively—an analysis that balances safety, recidivism, and protection of constitutional rights. This decision should not be distorted by the fact that private, but not public, providers are subject to *Bivens* liability, with its attendant risks of increased costs.

[16] Indeed, given that neither Congress nor this Court has ever held that entities—private or public—are subject to *Bivens* liability, "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom* v. *Roemer*, 501 U.S. 380, 396 n.23 (1991) (citing *Harrison* v. *PPG Indus.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)); *see also Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 588, 589 (1982) (accepting less drastic, "unremarkable" statutory interpretation in the face of legislative silence because "the fact that the dog did not bark can itself be significant").

See Gov't Br. 28. To say that a private entity's protection of constitutional rights is *one* factor in the government's contracting decision is not, as the ACLU states, to denigrate such rights. They are an important component in choosing providers, and government choice should not be distorted by adding in higher liability for private, but not public, entities. Accordingly, the Court should refuse to extend *Bivens* to private entities, just as it refused to extend *Bivens* to public entities.

III. SECTION 1983 IS IRRELEVANT WHEN DECIDING WHETHER TO EXTEND *BIVENS*.

Respondent and the ACLU seek to analogize *Bivens* actions to Section 1983 actions to show that private corporations are amenable to suit under *Bivens*. The analogy is totally inapt for several reasons. See Pet. Br. 32-35.

1. Most importantly, *Bivens* is a narrow, judge-made gap filler with a specific goal of deterring individual officers from violating the Constitution. Section 1983, by contrast, is part of an expansive congressionally created statutory scheme providing an all-purpose action for "monetary, declaratory, or injunctive relief," *Monell* v. *Department of Social Services*, 436 U.S. 658, 690 (1978), against "[e]very person," natural or artificial.

2. The analogy to Section 1983 ignores the fundamental distinction between the question of whether a defendant is amenable to suit under *Bivens* and the question of how to apply *Bivens* to a defendant covered by *Bivens*. Pet. Br. 34. As a consequence of this distinction, Section 1983 is relevant only to questions of application—not of amenability. *Id.*; *Butz* v. *Economou*, 438 U.S. 478, 503 (1978). Respondent and the ACLU's failure to accept this core distinction is clear, for *all* of the cases that they cite in support of their analogy involve application—not coverage.[17]

[17] *See Wilson* v. *Layne*, 526 U.S. 603, 609 (1999) (qualified immunity); *Graham* v. *Connor*, 490 U.S. 386, 394 & n.9 (1989) (excessive force);

3. Respondent and the ACLU also ignore CSC's and the Government's strong showing that, while *Bivens* is limited to *officers*, Section 1983 applies to the broader class of *persons*. This analysis, grounded in Section 1983's text and history, illustrates the wisdom of the Court's refusal to consider Section 1983 in determining whether to extend *Bivens*. Pet. Br. 32-33.[18] Indeed, *Monell*, cited by Respondent and the ACLU, relies on this analysis in holding that municipalities may be found liable under Section 1983. 436 U.S. at 690.

4. Respondent and the ACLU also completely misunderstand the point the Government is making in its analysis of Section 1983. As the Government explains, Section 1983 broadly imposes liability on any "person," including legal persons, and on anyone who "causes" another to be subjected to a constitutional violation. This language, illuminated by its legislative history and purposes, mandates the expansive reach of Section 1983, and its imposition of liability on entities that adopt unconstitutional policies, as well as individuals who violate the Constitution. *Bivens* actions, in marked contrast, are not based on a congressional text; instead, they are inferred by the courts only where necessary to deter natural persons from constitutional violations and provide remedies where none otherwise exists. For that reason, this Court has applied *Bivens* liability only to persons who directly participate in constitutional violations either by making or implementing unconstitutional policies.[19]

Carlson v. *Green*, 446 U.S. 14, 22 (1980) (availability of punitive damages); *Butz* v. *Economou*, 438 U.S. 478, 495-96 (1978) (qualified immunity).

[18] *Cf. Ngiraingas* v. *Sanchez*, 495 U.S. 182, 186-92 (1990) (relying on "person" analysis to hold that Section 1983 does not apply to territories); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 63-64 (1989) (relying on "person" analysis to hold that Section 1983 does not apply to States).

[19] *Wilson*, 526 U.S. at 614 (holding that the police violate the Fourth Amendment by bringing unnecessary third parties into a home when executing a warrant); *Carlson*, 446 U.S. at 16 n.1 (noting that plaintiff had

Moreover, the Court has never held *any entity* liable under *Bivens* for direct or indirect constitutional violations. See Gov't Br. 28-29 (citing cases).

5. The ACLU asserts that it is improper to treat State and federal prisoners held by private prison providers differently. But Section 1983 and *Bivens* often treat otherwise similarly situated defendants differently. For example, while municipal prisoners may sue the county jail under Section 1983, *Monell*, 436 U.S. at 690, federal prisoners cannot sue the equivalent federal agency under *Bivens*, see *Meyer*, 510 U.S. at 485.[20] The Court cannot and should not attempt to eliminate all potential inconsistencies, but, by refusing to extend *Bivens* to private entities, the Court can ensure that all *federal* prisoners enjoy the same rights. See Gov't Br. 9, 12, 23.

6. Finally, Respondent and his *amici* ignore what this Court has long recognized: while Congress is institutionally well-suited to enact broad remedies, the judiciary properly acts more cautiously in creating remedies. See Pet. Br. 33-34. Neither the text of nor the caselaw interpreting Section 1983—a comprehensive, congressionally enacted scheme—informs the Court as to the threshold question of whether extending *Bivens* to private entities acting under color of federal law is proper.

* * * * *

Bivens is a narrow gap-filler that this Court has refused to extend unless extension would fulfill the remedy's purposes and special factors do not counsel hesitation. *Meyer*, 510 U.S. at 486; Pet. Br. 7-8. Here, neither of these requirements

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claimed that the defendants "were deliberately indifferent to . . . serious medical needs").

[20] In fact, Section 1983 applies differently to various public entities. *Compare Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 690 (1978) (accepting Section 1983 liability for municipalities), *with Will*, 491 U.S. at 63-64 (rejecting Section 1983 liability for States), *and Ngiraingas*, 495 U.S. at 192 (rejecting Section 1983 liability for territories).

is met. Indeed, the proposed extension would both *undermine* deterrence of individual officers (be they policymakers or rogue actors) and distort federal fiscal and privatization policies. Accordingly, the Court should reject the Second Circuit's unwise extension of *Bivens* to private entities.

CONCLUSION

For the foregoing reasons and those stated in the opening brief and the brief of the United States, the decision of the court of appeals should be reversed.

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In the Supreme Court of the United States

CORRECTIONAL SERVICES CORPORATION, PETITIONER

v.

JOHN E. MALESKO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a private corporation operating a Community Corrections Center that houses and provides services to federal prisoners under a contract with the Bureau of Prisons is subject to suit under the implied damages action this Court recognized in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

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In the Supreme Court of the United States

No. 00-860

CORRECTIONAL SERVICES CORPORATION, PETITIONER

v.

JOHN E. MALESKO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns whether a private corporation that operates a correctional facility for federal prisoners is subject to suit under the cause of action for damages this Court recognized in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Petitioner is a private company that, under contract with the Bureau of Prisons (BOP or Bureau), operates Community Corrections Centers and other facilities for federal prisoners. Respondent was a prisoner housed in such a facility. Congress has authorized the Attorney General to contract with public and private entities to house and provide support for prisoners in Community Corrections Centers. See, *e.g.*, 42 U.S.C. 13901. In addition, Congress has authorized the placement of certain prisoners in secure correctional facilities that are privately operated. See, *e.g.*, National Capital Revitalization and Self-

Government Improvement Act of 1997, Pub. L. No. 105-33, Subtit. C, § 11201(c), 111 Stat. 734. The Immigration and Naturalization Service and the United States Marshals Service, like the BOP, also contract with private firms for detention services. See, *e.g.*, 18 U.S.C. 4013. The United States has an interest in the extent to which the entities with which it contracts are exposed to liability under *Bivens* for the allegedly unconstitutional conduct of their agents, as well as in ensuring proper deterrence of and appropriate remedies for such conduct.

STATEMENT

1. Private organizations have long played a role in the operation of correctional facilities. As this Court has observed, "[p]rivate individuals operated local jails in the 18th century," and "private contractors were heavily involved in prison management during the 19th century." *Richardson* v. *McKnight*, 521 U.S. 399, 405 (1997). One of the most significant roles for private organizations in adult corrections has been in the provision of community-based correctional facilities, such as halfway houses, designed to help prisoners re-integrate into society. In fact, private organizations such as "[c]oncerned citizens and religious groups established the first halfway houses and group homes for adult offenders," and "significant community corrections programs, including probation, were started in the same manner." Bowman, Hakim, & Seidenstat, *Privatizing Correctional Institutions* 116 (1992). See also *id.* at 7, 118 (noting the "long * * * established * * * use of private contracts * * * to operate various forms of programs and services, including halfway houses, work release programs, prerelease centers, group homes, and treatment centers for alcohol and drug offenders"). See also McDonald et al., *Private Prisons in the United States* 5 (1998) (study required by Pub. L. No. 105-277, § 111, 112 Stat. 2681-67).

For nearly half a century, the Bureau of Prisons has placed federal prisoners in halfway houses and similar facilities (now called "Community Corrections Centers") to assist them in making a successful transition from confinement to liberty. The placement of probationers and parolees in such facilities was originally a discretionary matter.[1] However, in 1984, Congress enacted 18 U.S.C. 3624 to provide for more extensive use of such facilities. In relevant part, Section 3624(c) provides:

> [T]he Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term * * * under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's reentry into the community.

18 U.S.C. 3624(c).

Consistent with Section 3624, the BOP generally places eligible "inmates who are nearing their release date" in a Community Corrections Center, where they receive employment assistance, counseling, and supervision. See Bureau of Prisons, *Community Corrections Manual*, Program Statement 7300.09, § 1.2 (Jan. 2, 1998) (*Community Corrections Manual*) (*available* http://www.bop.gov/progstat/7300_09.pdf). In addition, the BOP employs such facilities as an alternative to "institutional confinement for certain short-term offenders" and as "a structured environment for [those] probationers, parolees, and supervised releasees who need more assistance and supervision than" would otherwise be available. *Ibid.*; see also *id.* § 4.1.2.

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[1] See 18 U.S.C. 4203 (1970) (providing that the Parole Board could require a federal parolee "to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of parole"); 18 U.S.C. 3651 (Supp. II 1972) (permitting court to impose same conditions on probationers).

Since the late 1960s, the BOP has contracted with private for-profit and not-for-profit companies to operate Community Corrections Centers to help federal prisoners reintegrate into society. McDonald, *supra*, at 5. The Bureau has not itself operated such facilities since 1981; instead, it relies exclusively on contracts with not-for-profit institutions, state and local governments, and private for-profit organizations.[2] The Bureau's *Community Corrections Manual* establishes an extensive program of pre-contract inspections and post-contract performance monitoring, evaluation, and correction, *Community Corrections Manual* §§ 4.4.2, 4.5.5 to 4.5.14, to ensure that contractors provide a safe, controlled environment with programs that help offenders become law-abiding citizens. See Bureau of Prisons, *Statement of Work for Community Corrections Center* 1 (Dec. 2000) (*BOP Statement of Work*) (*available* http://www.bop.gov/ccdpg/ccdccc.pdf). The Bureau conducts full monitoring—"a thorough, comprehensive review of the contractor's operation"—at regular intervals, and interim or spot-check examinations more frequently. *Community Corrections Manual* § 4.5.6.1. The BOP examines, among other things, the center's personnel, *id.* § 4.5.7.2, its facility (with an emphasis on safety, sanitation, and environmental health), *id.* §§ 4.5.7.3 to 4.5.7.4, and its provision of programs in areas such as employment, housing and substance abuse, *id.* § 4.5.7.6. The Bureau also offers its contractors training and management assistance to "increase the quality of contract corrections provided to Federal inmates." *Id.* § 4.5.8. The BOP's Administrative Remedy Program, 28

[2] For example, the Bureau contracts not only with for-profit entities like petitioner, but also with charitable organizations like Volunteers of America (which operates facilities in Indiana, Louisiana, Maryland, Minnesota, New York, and Texas), the Salvation Army (Arkansas, Florida, Illinois, North Carolina, Tennessee, and Texas), Progress House Association (Oregon), Triangle Center (Illinois), and Catholic Social Services (Pennsylvania).

C.F.R. 542.10, is open to prisoners residing in contract Community Corrections Centers.

2. Petitioner Correctional Services Corporation (CSC) had operated the Le Marquis Community Correctional Center in New York under a contract with the BOP since the late 1980s. Respondent John Malesko is a former federal inmate who, after his conviction for federal securities fraud in December of 1992, was sentenced to a term of incarceration of eighteen months. While in the custody and care of the BOP, respondent was diagnosed with a heart condition and treated with prescription medication. As respondent neared his release date, the BOP transferred him to the Le Marquis halfway house for the remainder of his sentence, as contemplated by 18 U.S.C. 3624(c). Pet. App. 2a; J.A. 10-11.

According to his complaint, respondent was assigned to living quarters on the fifth floor at Le Marquis. Respondent alleges that, on or about March 1, 1994, CSC instituted a policy requiring inmates residing below the sixth floor to use the staircase rather than the elevator to travel from the first-floor lobby to their rooms. Respondent claims that, despite that alleged policy, CSC staff permitted him to use the elevator because they knew of his medical condition. He claims, however, that CSC employee Jorge Urena prevented him from using the elevator to go to his fifth-floor room on March 28, 1994. Pet. App. 2a-3a; J.A. 11. According to respondent, Urena directed him to use the staircase, even though respondent reminded Urena of his heart condition. While climbing the stairs, respondent suffered a heart attack and fell. J.A. 12. He alleges that the fall aggravated a pre-existing "injury to his *left* ear," causing a loss of equilibrium, and that he endured bruising, pain and suffering as well. *Ibid.* Respondent also claims that approximately ten days before that incident, he had run out of the medication

prescribed for his heart condition, and that CSC had failed to replenish it. Pet. App. 3a; J.A. 12.[3]

3. Almost three years later, on March 27, 1997, respondent filed a pro se action against CSC and unnamed CSC employees in the Southern District of New York, claiming that they had violated his rights. In 1999, respondent, with counsel, filed an amended complaint which was identical to the initial complaint in all material respects, except one: for the first time, the complaint specifically named as a defendant Urena, the CSC employee who had allegedly barred respondent from using the elevator. Pet. App. 3a.

The district court dismissed the amended complaint. The court treated the complaint as raising claims under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Relying on this Court's decision in *FDIC* v. *Meyer*, 510 U.S. 471, 483-486 (1994), the district court held that CSC, as a private corporation, is not subject to suit under *Bivens*. Pet. App. 21a. The district court dismissed the complaint with respect to Urena on statute of limitations grounds. *Id.* at 22a-24a.

4. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-18a. The court of appeals affirmed dismissal of respondent's claims against Urena as barred by the statute of limitations. *Id.* at 15a-18a. Respondent has not sought further review of that ruling, and it is no longer at issue in this case.

With respect to CSC, however, the court of appeals reversed the district court's judgment of dismissal. See Pet. App. 5a-15a. The court of appeals observed that, in *FDIC* v. *Meyer*, *supra*, this Court had declined "to expand the category of defendants against whom *Bivens*-type actions may be brought to include not only federal agents, but federal

[3] Under the BOP's contracts, residents are generally responsible for the costs of their medical and dental care, although facilities are required to ensure proper medical treatment "[i]n an emergency." See *BOP Statement of Work* 88.

agencies as well." Pet. App. 6a (quoting *Meyer*, 510 U.S. at 484 (emphasis omitted)). The court of appeals also noted that, in *Kauffman* v. *Anglo-American School of Sofia*, 28 F.3d 1223 (1994), the D.C. Circuit had relied on *Meyer*'s reasoning in refusing to extend *Bivens* actions to private corporations like CSC. Pet. App. 7a. The court of appeals, however, declined to follow *Kauffman*, attempted to distinguish *Meyer*, and followed the Sixth Circuit's decision in *Hammons* v. *Norfolk Southern Corp.*, 156 F.3d 701 (1998), which had concluded that private corporations acting under color of federal law are subject to suit under *Bivens*. Pet. App. 10a.

Although the court of appeals acknowledged that this Court in *Meyer* had refused to recognize a *Bivens* action that would not deter wrongdoing by individual government agents and would result in an increased financial burden for the government, the court of appeals stated that *Meyer* does not control the outcome here. The court reasoned that, "even absent a substantial deterrent effect, an extension of [*Bivens*] liability [is] warranted * * * in order to accomplish the more important *Bivens* goal of providing a remedy for constitutional violations." Pet. App. 10a. The court of appeals also hypothesized that extending *Bivens* liability to corporations might promote deterrence: "Even assuming a plaintiff would decline to sue the offending employee and sue only the employer, we believe that an employer facing exposure to such liability would be motivated to prevent unlawful acts by its employees." *Id.* at 11a. The court of appeals also acknowledged that private contractors would pass on the increased costs associated with *Bivens* actions to the federal government. *Ibid.* But the court was of the view that this Court's decision in *Meyer* was primarily concerned with the financial burdens caused by "imposing *Bivens* liability directly upon federal agencies." *Ibid.*

Finally, the court of appeals stated that its decision was "influenced strongly by the law governing § 1983 claims."

Pet. App. 12a. In the context of Section 1983 actions, the court of appeals stated, this Court had recognized that private corporations engaging in state action may be liable. *Ibid.* (citing *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936-937 (1982)). The court saw "no reason not to incorporate that law into the *Bivens* context and permit suits against private corporations engaging in federal action." *Ibid.*

SUMMARY OF ARGUMENT

A. In 1971, in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, this Court recognized an implied private damages action under the Fourth Amendment against federal officers. In recognizing that right of action, the Court acknowledged that Congress had not provided a damages remedy against federal officers. 403 U.S. at 397. And the Court observed that "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation." *Id.* at 396. Nonetheless, relying on the Court's then-existing precedents regarding implied private rights of action under federal statutes, see *id.* at 397 (citing *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964)), the Court concluded that it had authority to create a damages remedy under the Fourth Amendment itself. In recognizing that damages action, the Court specifically relied on, *inter alia*, the deterrent effect on federal officers, the absence of any other available federal remedy under the circumstances, and the lack of special circumstances counseling hesitation in the face of congressional silence. In recent times, however, the Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988).

B. Caution is particularly warranted here. Respondent seeks not one but two extensions of the limited damages remedy recognized in *Bivens*. First, respondent requests that *Bivens* be extended to permit federal prisoners housed

in private correctional institutions to bring suits against *private* parties acting under color of federal law. Second, he asks that *Bivens* be extended so that those prisoners may seek damages not merely from the *individuals* who violate their constitutional rights, but also from the correctional *institution* that employs those individuals. That second extension would give prisoners in private correctional facilities a federal *Bivens* damages remedy that their counterparts in federally operated facilities do not possess. In light of *FDIC* v. *Meyer*, 510 U.S. 471 (1994), prisoners in BOP-operated facilities can sue individual BOP employees for constitutional violations, but they have no *Bivens* action against the correctional facility or the BOP itself. Nothing in *Bivens*' rationale suggests that a prisoner in a *private* facility should have a federal cause of action for damages against the correctional institution itself when his counterparts in BOP-operated facilities do not.

The logic of *Bivens* itself, moreover, counsels against the extension of *Bivens* that respondent seeks. Like the proposed extension this Court rejected in *Meyer*, respondent's proposed cause of action would give prisoners an incentive to sue the correctional corporation *rather than* the individual officers directly responsible for the constitutional violation. It thus would, like the extension the Court rejected in *Meyer*, undermine "the purpose of *Bivens*," which is "to deter *the officer*," 510 U.S. at 485. The decision to recognize a damages remedy in *Bivens*, moreover, rested in part on necessity; absent a judicially crafted remedy, there would have been no remedy for the constitutional violation. *Id.* at 484. Here, federal prisoners in private institutions have extensive remedies even absent the extension of *Bivens* that respondent seeks. In addition, because the BOP exercises extensive oversight over the private facilities with which it contracts, there is little reason why those facilities should be treated differently for *Bivens* purposes than the facilities the BOP operates itself.

C. Further considerations also counsel hesitation here. Recognizing an additional *Bivens* damages action directly against correctional corporations in this context has the potential of impeding the BOP's implementation of important correctional programs—programs that long have been provided exclusively through contracts with private facilities, and that Congress has statutorily encouraged the BOP to pursue. In addition, because the government cannot be held directly liable under *Bivens* when it provides correctional services itself, imposing liability on private providers of correctional services that step into the BOP's shoes under contract could distort the choice between contracting out and providing services in house. Such choices should be made in light of efficiency and the quality of services offered. They should not be influenced by the unnecessary judicial imposition of direct liability and thus increased costs on one source (private facilities) that the other source (the government) does not confront.

D. Finally, the court of appeals erred in relying on the scope of liability under 42 U.S.C. 1983. Section 1983 is a *statute*, and the scope of liability under it is a question of Congress's intent. As a result, this Court has construed Section 1983's scope in light of its specific language and unique legislative history. Those considerations have no application to the judicially crafted *Bivens* cause of action. Instead, this Court must consult the same broad considerations of policy that led to the judicial recognition of a limited damages action in *Bivens* itself. Those considerations counsel against the extension of *Bivens* liability that respondent seeks, and the extension should be rejected.

ARGUMENT

THE IMPLIED DAMAGES ACTION RECOGNIZED IN *BIVENS* DOES NOT PROPERLY EXTEND TO PRIVATE ENTITIES OPERATING CORRECTIONAL FACILITIES UNDER FEDERAL CONTRACT

In this case, respondent invites this Court to extend the implied damages remedy recognized in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), so that federal prisoners housed in privately run correctional facilities may seek damages not only from the individuals who violate their constitutional rights, but also from the correctional institution employing those individuals.[4] In requesting that extension, respondent does not seek merely to place federal prisoners who reside in private correctional facilities in the *same* position as those residing in the BOP's own facilities. Rather, he asks the Court to extend *Bivens* to afford prisoners in private facilities an additional implied federal damages remedy that their counterparts in federally operated facilities do not possess.

That request should be denied. The rights of federal prisoners in BOP-operated facilities are adequately protected through, *inter alia*, the availability of two damages actions—a *Bivens* action against any *individual* officer who violates the prisoner's constitutional rights, and a statutorily conferred tort suit (subject to certain limits) against the government under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* As *FDIC* v. *Meyer*, 510 U.S. 471 (1994), makes clear, prisoners in BOP institutions have no *Bivens* action against the correctional facility or the BOP itself. The parties do not

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[4] For purposes of this case, we assume that CSC and its employees were, in relevant respects, acting under color of federal law. *Bivens* recognized an action against federal officers for violation of constitutional rights. If such an action lies against private individuals or entities, it can extend only to actions taken under color of federal law.

dispute that federal prisoners in private facilities may bring equivalent actions: a *Bivens* claim against the individuals responsible for the constitutional violation and a tort suit against the correctional entity that employed those individuals. The question before this Court is whether prisoners in private correctional facilities, unlike their governmentally housed counterparts, should also have an implied federal damages action against the correctional facility itself. They should not. There is no reason why federal prisoners in privately run institutions should enjoy an additional implied federal damages action that prisoners in governmental facilities do not possess. To the contrary, the damages remedies designed to serve deterrence and remedial goals in the context of government-operated facilities fulfill those same goals in private correctional institutions as well. There is neither need nor justification for the courts to infer an additional damages remedy in the absence of congressional action here.

A. This Court Does Not Lightly Extend The Limited Damages Remedy Recognized In *Bivens* Into New Contexts

1. In its 1971 decision in *Bivens* v. *Six Unknown Named Agents*, this Court recognized an implied private damages action under the Fourth Amendment against federal officers alleged to have violated a citizen's rights. In recognizing that implied damages action, the Court acknowledged that Congress had not specifically provided a damages remedy against federal officers for Fourth Amendment violations. 403 U.S. at 397. And the Court agreed that "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation." *Id.* at 396. Nonetheless, relying on its earlier decisions recognizing implied private damages actions under federal statutes, see *id.* at 397 (citing *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964)), the Court concluded

that it had authority to recognize such a remedy under the Fourth Amendment: "[W]here federally protected rights have been invaded," the Court stated, "it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id.* at 392 (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)); *id.* at 396 ("where legal rights have been invaded, * * * federal courts may use any available remedy to make good the wrong done") (internal quotation marks omitted).

The Court also concluded that a damages remedy would be appropriate in the Fourth Amendment context. "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at 395. More importantly, the Court found no "special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396. The case did not deal "with a question of 'federal fiscal policy.'" *Ibid.* (quoting *United States* v. *Standard Oil Co.*, 332 U.S. 301, 311 (1947)). Nor was an implied cause of action inconsistent with an alternative remedial scheme established by Congress. *Id.* at 397.

Justice Harlan concurred in the judgment. Relying on the Court's then-existing cases inferring damages remedies "to effectuate statutory policies," 403 U.S. at 406; see also *id.* at 402 & n.4, Justice Harlan also viewed the question before the Court as "whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted." *Id.* at 407. In concluding that a damages action would be appropriate in the Fourth Amendment context, Justice Harlan emphasized that, because the government itself is immune from suit, an action for damages against an individual officer offered the only potential avenue for redress. "For people in Bivens' shoes," Justice Harlan stated, "it is damages or nothing." *Id.* at 410.

Although *Bivens* itself arose under the Fourth Amendment, in the following decade the Court relied on *Bivens* to recognize an implied damages remedy under the Due Pro-

cess Clause of the Fifth Amendment, *Davis* v. *Passman*, 442 U.S. 228 (1979), and the Cruel and Unusual Punishment Clause of the Eighth Amendment, *Carlson* v. *Green*, 446 U.S. 14 (1980). "In each of these cases, as in *Bivens* itself, the Court found that there were no 'special factors counselling hesitation in the absence of affirmative action by Congress.'" *Chilicky*, 487 U.S. at 421 (quoting *Bivens*, 403 U.S. at 396). See also *Carlson*, 446 U.S. at 18-20; *Davis*, 442 U.S. at 246-247.

2. This Court's "more recent decisions," however, "have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Chilicky*, 487 U.S. at 421. In *Bush* v. *Lucas*, 462 U.S. 367 (1983), for example, the Court declined to create a *Bivens*-like remedy against individual government officials for a First Amendment violation arising in the federal employment context. In that case, a federal employee claimed that he was demoted in violation of the First Amendment for making public statements critical of his employer. Concluding that the administrative review mechanisms crafted by Congress provided meaningful redress, the Court refused to create a damages action, even though it assumed a violation of the First Amendment and the absence of a complete remedy. *Id.* at 372-373, 386, 388. As this Court later observed, the Court in *Bush* relied on the fact "that the Legislature is far more competent than the Judiciary to carry out the necessary 'balancing [of] governmental efficiency and the rights of employees,'" and "refused to 'decide whether or not it would be good policy to permit a federal employee to recover damages from a supervisor who has improperly disciplined him for exercising his First Amendment rights.'" *Chilicky*, 487 U.S. at 423 (quoting *Bush*, 462 U.S. at 389, 390).

Two years later, in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), this Court reached a similar result in the military context. In that case, the Court refused to create a *Bivens* action against superior officers alleged to have injured enlisted personnel through unconstitutional conduct, even though the enlisted personnel had no remedy against the government itself. Noting the unique nature of military life, the Court again found "special factors counselling hesitation" in the absence of affirmative action by Congress. *Id.* at 298, 304. See also *United States* v. *Stanley*, 483 U.S. 669, 681 (1987) (disallowing *Bivens* actions by military personnel "whenever the injury arises out of activity 'incident to service'").

One year later, in *Chilicky*, the Court declined to rely on *Bivens* to infer a damages action against individual government employees alleged to have violated due process in their handling of social security disability benefits applications. Emphasizing that Congress had provided meaningful (albeit incomplete) remedies by statute, the Court observed that its recent decisions "have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." 487 U.S. at 421. In any event, the Court explained, "[t]he absence of statutory relief for a constitutional violation * * * does not by any means necessarily imply that courts should award money damages." *Ibid.*

Most recently, in *FDIC* v. *Meyer*, *supra*, this Court declined to extend *Bivens* to permit suit against a federal agency, even though the agency—because Congress had waived its sovereign immunity—was otherwise amenable to suit. See 510 U.S. at 484-486. The Court emphasized that "the logic of *Bivens*" contemplates only a limited action against individuals, not against federal agencies. See *id.* at 485. The Court also observed that allowing a *Bivens* suit against an agency would undermine the deterrent effect that *Bivens* has on individual employees. If the Court "were to imply a damages action directly against federal agencies," the Court explained, "there would be no reason for aggrieved parties to bring damages actions against individual officers." *Ibid.* Finally, the Court noted the threat to federal fiscal interests: "If we were to recognize a direct action for

damages against federal agencies," the Court explained, "we would be creating a potentially enormous financial burden for the Federal Government." *Id.* at 486. Against that backdrop, the Court saw "special factors counselling hesitation" in the absence of affirmative action by Congress, *ibid.* (quoting *Bivens*, 403 U.S. at 396), and concluded that a cause of action against a federal agency should not be recognized absent express congressional direction, *ibid.*[5]

The considerations that informed the Court's refusal to extend the judicially created *Bivens* remedy in *FDIC* v. *Meyer* counsel the same result here. Respondent's claim, in

[5] This Court's increasingly cautious attitude toward recognition of additional implied damages actions for constitutional violations under *Bivens*' reasoning parallels the Court's increasing reluctance to establish or extend implied rights of action for statutory violations. At the time *Bivens* was decided, the Court had an expansive view of its authority to create causes of action to effectuate statutory goals, even absent any textual or structural basis for inferring that such a right of action was intended. "[I]t is the duty of the courts," the Court stated in *J.I. Case Co.* v. *Borak*, "to be alert to provide such remedies as are necessary to make effective the congressional purpose," 377 U.S. at 433. This Court "abandoned that understanding" of its role decades ago, and has declined to "revert" to "the understanding of private causes of action that held sway 40 years ago." *Alexander* v. *Sandoval*, 121 S. Ct. 1511, 1520 (2001). Instead, the Court now confines itself to "interpretation of the text and structure of the Act," *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994), to discern whether Congress meant not only to establish a right but also "to create the private remedy asserted," *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15-16 (1979). As the Court observed in *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979), "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." Instead, the Court must "conclud[e] that Congress intended to make a remedy available to [that] special class of litigants." *Ibid.* See also *id.* at 717-718 (Rehnquist, J., concurring) ("I think the approach of the Court * * * is quite different from the analysis in earlier cases such as *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). * * * [F]ederal courts * * * must surely look to * * * whether there was an intent to create a private right of action.").

fact, rests on *two* proposed extensions of *Bivens*. First, although this Court has never held that private individuals acting under color of federal authority may be held liable under *Bivens*, both respondent and petitioner appear to assume that such an extension would be proper. For present purposes, we assume such an extension of *Bivens* is proper as well.[6] After all, if *Bivens* does not authorize an action against the *individuals* who directly commit the constitutional violation, *a fortiori* it does not authorize the imposition of damages on the *institution* that employed those individuals. Second, respondent urges the Court to extend *Bivens* liability further, beyond the individuals directly responsible for the constitutional deprivation, to the corporation for whom those individuals acted as agents. As we demonstrate below, that second extension of *Bivens* is not supported.

[6] The same rationales that supported the creation of a *Bivens* remedy against federal employees—deterring individuals from engaging in unconstitutional conduct, and ensuring the availability of a remedy separate and apart from state tort law, see pp. 18-23, *infra*—support the recognition of such a remedy against private individuals who violate constitutional rights under color of federal law. *Bivens* itself, moreover, provides no reason to distinguish between employees and non-employees who exercise federal authority. The Court's decision to recognize a federal cause of action in *Bivens* did not rest on the fact that the defendants there were formally employed by the United States; it rested on the fact that they exercised *federal power*. See 403 U.S. at 391-392. See also *id.* at 392 (Fourth Amendment guarantees "the absolute right to be free from unreasonable searches and seizures carried out *by virtue of federal authority*") (emphasis added). Of course, private-sector employees generally have greater exposure to state law claims and fewer immunities than their public-sector counterparts, which may lessen the imperative of inferring a constitutional cause of action.

B. The Deterrence and Remedial Rationales That Underlay The Creation Of A Damages Remedy In *Bivens* Do Not Support Creating A Damages Action Against Private Correctional Corporations

The *Bivens* cause of action is, in origin and by nature, a limited remedy against the individuals directly responsible for the constitutional deprivation. In *Bivens* itself the claimant "sued the agents of the Federal Bureau of Narcotics who allegedly violated his rights, not the Bureau itself." *Meyer*, 510 U.S. at 484. Similarly, the parties in this case do not dispute that respondent could have sued the individual CSC agents who allegedly violated his rights.[7] So long as claimants like respondent can bring a *Bivens* claim directly against the individuals responsible for a constitutional injury, the recognition of an additional implied damages action against the correctional institution is neither "'necessary' [n]or 'appropriate' to the vindication of" their interests. 403 U.S. at 407 (Harlan, J., concurring). To the contrary, as in *FDIC* v. *Meyer*, the "logic of *Bivens*" counsels against such an extension.

1. As an initial matter, this Court "implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available." 510 U.S. at 485. As Justice Harlan observed in *Bivens*, "[f]or people in Bivens' shoes, it [wa]s damages" against the individual agents "or nothing." 403 U.S. at 410 (Harlan, J., concurring). Cf. *Carlson*, 446 U.S. at 22-23 (noting limitations on government's tort liability under the Federal Tort Claims Act). Here, in contrast, it is not damages against the corporate contractor or nothing. Instead, like the respondent in *Meyer*, respondent in this case by hypothesis can bring a *Bivens* action against the individuals directly responsible for his constitutional injury.[8] Respondent thus appears to ask the Court to do precisely what it properly declined to do in *Meyer*—"to imply a damages action based on a decision that presumed the *absence* of that very action." 510 U.S. at 485.

Respondent's proposed cause of action against the corporation, moreover, would tend to undermine the goal of individual deterrence on which the *Bivens* damages remedy rests. "It must be remembered," this Court stated in *Meyer*, "that the purpose of *Bivens* is to deter *the officer*." 510 U.S. at 485.[9] In *Meyer*, the Court concluded that recognizing an implied damages action directly against the agency might leave aggrieved parties "no reason * * * to bring damages actions against individual officers. Under [such a] regime, the deterrent effects of the *Bivens* remedy" on individual officers "would be lost." *Ibid.* The same reasoning applies here as well. Here, as in *Meyer*, providing a damages action against the corporate employer would undermine the incentive for aggrieved parties to sue the individual directly responsible for their constitutional injuries. Consequently, here, as in *Meyer*, the "provision of a damages remedy against a private entity would actively diminish the deter-

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[7] In fact, respondent did sue one of the individuals, Urena, under *Bivens*. Two years after filing the initial complaint, respondent sought to amend it to name Urena as a defendant. Respondent's decision to amend the complaint to name Urena as a defendant, however, came after the statute of limitations had run. Because the proposed amendment did not "relate back" to the original filing date of the complaint under Federal Rule of Civil Procedure 15(c), the district court and court of appeals both concluded that the claim against Urena was barred by the statute of limitations. See Pet. App. 15a-18a, 22a-24a.

[8] In addition, respondent could have brought a common-law tort action against the responsible individuals and the correctional corporation that employed them. Cf. *Meyer*, 510 U.S. at 485 n.10.

[9] This is not to suggest that the *Bivens* remedy is perfectly calibrated to achieve optimal deterrence. But the goal of deterrence has been, from the outset, one of the principal rationales underlying *Bivens* and its progeny.

rent value of the remedy against the individual." *Kauffman* v. *Anglo-American Sch. of Sofia*, 28 F.3d 1223, 1227 (D.C. Cir. 1994). For that very reason, the D.C. Circuit has observed:

> If such additional [corporate] defendants were available (often with deeper pockets than the individual offenders), plaintiffs might make the same choice as the Kauffmans, who brought their *Bivens* actions *only* against the private entity and not against the individual[s]. * * * To the extent that plaintiffs make such choices with any regularity, *Meyer* indicates that the deterrent effect of the *Bivens* remedy would be weakened. In sum, on *Meyer*'s deterrence rationale there is no affirmative reason to recognize *Bivens* actions against private entities, and there is some reason *not* to do so.

Ibid.[10]

[10] In *Meyer*, the Court expressed concern that plaintiffs would have a special incentive to sue the agency but not the individuals. In particular, the Court explained, such a strategy would permit plaintiffs to avoid the individual officer's qualified immunity defense. 510 U.S. at 485. That specific concern, of course, may not be present here; this case does not involve qualified immunity, and private prison guards may not enjoy the same qualified immunity protection as government employees. See *Richardson* v. *McKnight*, 521 U.S. 399 (1997). But there remains a significant incentive to bypass suit against—and thus diminish the deterrent effect on—the individual officer. Rather than risk suit against potentially sympathetic individual defendants with limited resources, plaintiffs may well prefer to bring suit against an abstract corporate defendant with ample resources and little claim to the sympathies of the jury. Indeed, it is well documented that corporations fare worse before juries than do individuals. See Chin & Peterson, *Deep Pockets, Empty Pockets* at vii, 43 (1985) (Rand Institute for Civil Justice study indicating that corporate defendants typically must pay awards that are "30 percent more than what an individual defendant would pay in the same case," and that they pay 4.4 times as much if the case involves a serious injury; also noting that, in some categories of cases, corporations are more likely to be found liable in the first place); Hans & Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 Law & Hum. Behav. 151, 162 (1989) (experiments indicating that jurors treat corporations less favorably); MacCoun, *Differential Treatment of Corporate Defendants By Juries*, 30 L. & Soc'y Rev. 121, 140 (1996) ("corporations were indeed treated differently"). See also *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (plurality) (noting "the risk that" awards may be "influenced by prejudice against large corporations"); *id.* at 490-492 (O'Connor, J., dissenting) (tracing similar concerns through history).

2. The court of appeals' initial response was to discount the importance of the deterrence rationale and declare that "an extension of [*Bivens*] liability [is] warranted" in this context "even absent a substantial deterrent effect in order to accomplish the more important *Bivens* goal of providing a remedy for constitutional violations." Pet. App. 10a.[11] That assertion is mistaken in law and fact. First, as a matter of law, this Court has explained that "the purpose of *Bivens* is to deter *the officer*," *Meyer*, 510 U.S. at 485, and that "[t]he absence of statutory relief for a constitutional violation * * * does not by any means necessarily imply that courts should award money damages," *Chilicky*, 487 U.S. at

[11] The court of appeals speculated that corporate liability would promote *Bivens*' deterrent goal because "an employer facing exposure to * * * liability would be motivated to prevent unlawful acts by its employees," Pet. App. 11a, but that is the analysis this Court rejected in *Meyer*. Recognizing a cause of action against the corporate employer shifts the burdens of standing trial and (in cases where the agents and officers err) providing compensation from the individual agents and officers themselves to the corporation and its shareholders. As this Court observed in *Meyer*, 510 U.S. at 485, and as explained above, pp. 19-20, *supra*, that shift *decreases* the deterrent effect on the *individual* agents and officers that *Bivens* attempts to create. Moreover, a corporation "can only act through its agents and officers." *New York Cent. & Hudson River R.R.* v. *United States*, 212 U.S. 481, 495 (1909). Consequently, so long as all of the corporation's *agents* and *officers*—the corporation's decision- and policy-makers—confront potential personal liability for constitutional deprivations, anyone who could cause the corporation to act unconstitutionally should, by *Bivens*' rationale, be deterred from doing so by the prospect of individual liability under *Bivens*.

421. Cf. *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979) ("As our recent cases * * * demonstrate, the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person."). This Court's qualified immunity decisions, moreover, belie the notion that *Bivens* rests on a need to ensure that there is a monetary remedy for all constitutional injuries. Those decisions recognize that, even where government officers violate the Constitution, society's need for decisive action by government officers will often counsel against providing a monetary remedy.[12]

Second, the court of appeals' suggestion that it is appropriate to extend *Bivens* in this context to "provid[e] a remedy," Pet. App. 10a, is mistaken as a matter of fact. Even if one were to assume (contrary to *Chilicky*'s observation) that the absence of other remedies would by itself necessarily justify the creation of an implied cause of action, that hypothetical circumstance does not exist here. Simply put, inmates in private institutions already have remedies—remedies that parallel those available to (and adequate for) their publicly housed counterparts. "For people in [respondent's] shoes, it is" *not* "damages" against the corporation "or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring); *Passman*, 442 U.S. at 245 ("For Davis, as for Bivens, 'it is damages or nothing,'" since "there are available no other alternative forms of judicial relief."). To the contrary, the parties do not dispute that respondent had a *Bivens* action against the *individuals* who violated his constitutional rights. See pp. 17, 18 & note 6, *supra*. Nor do they dispute that respondent had a state tort action against both the

[12] As this Court has explained, "[q]ualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt* v. *Cole*, 504 U.S. 158, 167 (1992) (citations omitted). This case, of course, does not involve any qualified immunity questions.

individual defendants and the corporation. See p. 19 note 8, *supra*; p. 24 note 14, *infra*. Respondent thus does not seek merely to ensure the availability of remedies; rather, he seeks their multiplication.

In so doing, respondent seeks to provide federal prisoners in privately run institutions with a federal damages action that their counterparts in BOP-operated institutions lack. A federal prisoner housed in a BOP facility who suffers a constitutional deprivation has a *Bivens* remedy against the individual employee involved, subject to the defense of qualified immunity. As *Meyer* makes clear, however, a BOP-housed inmate has no *Bivens* remedy against that individual's employer, the United States and the BOP. With respect to the constitutional deprivation, his only remedy lies against the offending individual, a remedy *Meyer* found to be sufficient. See 510 U.S. at 485-486. Respondent nonetheless asks the Court to permit prisoners in private facilities to bring an implied federal damages action against not only the individual responsible for the violation (perhaps without a qualified immunity defense) but also his employer—the correctional institution—which is precisely what BOP-housed inmates cannot do. There is nothing in *Bivens* to suggest that federal prisoners housed in *private* contract facilities should have a federal cause of action that is not available to their governmentally housed counterparts. To the contrary, just as a potential *Bivens* action against the responsible individual, and a claim based on state tort law against the institution, are sufficient for inmates housed in BOP facilities, they are sufficient for inmates in contract facilities. That is particularly true because, even without the federal corporate liability that respondent demands, prisoners in privately run institutions in many respects have a superior *Bivens* remedy compared to their federally housed

counterparts,[13] a more extensive tort remedy,[14] and equal access to remedial mechanisms such as suits for injunctive relief and grievances filed through the BOP's Administrative Remedy Program.[15]

Finally, the court of appeals ignored the special status of the private for-profit and not-for-profit entities that contract with the Bureau in this context. To the extent those entities

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[13] Prisoners in federally operated facilities must, as part of their *Bivens* action, overcome the prison guards' defense of qualified immunity; prisoners in private facilities presumably do not. *Richardson* v. *McKnight*, *supra* (holding that private-sector prison guards acting under color of state law do not enjoy qualified immunity under 42 U.S.C. 1983).

[14] A prisoner confined in a privately run facility may bring a tort suit against the facility directly under state law. A federal prisoner, in contrast, is confined to suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, which generally incorporates the tort law of the State in which injury occurs, but creates numerous exceptions. In particular, the FTCA provides that the United States "shall be liable, respecting * * * [certain] tort claims, in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674, subject to certain procedural requirements, 28 U.S.C. 2675, and exceptions, such as the discretionary function exception, 28 U.S.C. 2680(a), and an exclusion for certain intentional torts, 28 U.S.C. 2680(h). In addition, the FTCA bars jury trials, 28 U.S.C. 2402, and awards of punitive damages and interest, 28 U.S.C. 2674. Thus, although both a prisoner in a private facility and in a federally operated facility have, in theory, a remedy grounded in local state tort law, prisoners in private facilities are not subject to the limits, exclusions, and procedural requirements imposed by the FTCA.

[15] Like inmates "confined in institutions operated by the Bureau of Prisons, * * * inmates designated to contract Community Corrections Centers" may invoke the Bureau's "Administrative Remedy Program," a "process through which inmates may seek formal review of an issue which relates to any aspect of their confinement." 28 C.F.R. 542.10. See also 28 C.F.R. 542.12 (excluding certain matters, which are subject to an alternative procedural mechanism, from the grievance mechanism). Once a complaint is filed, the Community Corrections Manager, Warden, Regional Director, and General Counsel are responsible for ensuring that complaints are properly investigated. 28 C.F.R. 542.11.

exercise federal authority, they exercise that authority on behalf of—they stand in the shoes of—the BOP itself in pursuit of the Bureau's penological mission. The BOP does not itself confront *Bivens* liability for the conduct of the agents through whom it pursues that mission; nor should the not-for-profit and for-profit corporations to whom the BOP contractually delegates its important duties. That is especially true in light of the oversight and enforcement role the BOP retains when it delegates its authority. The Bureau continues protecting prisoners in Community Corrections Centers by, among other things, making its administrative grievance process available to them. See p. 24 & note 14, *supra*. And it oversees the Community Corrections Centers themselves through extensive contract monitoring and performance evaluation, as provided in the *Community Corrections Manual*, to ensure that such facilities meet contract goals and provide federal prisoners with the quality care and support they require during their transition from confinement to liberty. See p. 4, *supra* (describing oversight and inspections). The BOP's current *Statement of Work*—the model contract that provides the minimum requirements for Community Corrections Centers—contains 24 chapters and spans 108 pages. It covers requirements that range from staff training and qualification, to facilities, to food, to employment counseling and assistance. See p. 4, *supra*. That extensive oversight makes it particularly difficult to justify a differential rule for BOP-regulated and BOP-operated institutions.

Indeed, the BOP's extensive administrative and contractual oversight provide an additional source of deterrence that obviates the need to create further *Bivens*-like liability. While the BOP's oversight may not be able to ensure that each individual employee always observes constitutional norms, the oversight can ensure that the corporation itself complies with the BOP's regulations and avoids systematic practices or policies that violate the Constitution. The

combination of BOP oversight over the corporation, individual officer liability under *Bivens*, and potential tort liability under state law leaves no remedial gap to be filled through the judicial creation of a further remedy.

C. Expansion Of Judicially Created Liability Is Particularly Inappropriate In Light Of Express Congressional Policy

The court of appeals acknowledged that judicial expansion of *Bivens* liability would affect federal fiscal interests, because contracting parties subjected to direct *Bivens* liability would pass on those additional expenses to the government. Pet. App. 11a. However, the court discounted that effect because it read this Court's decision in *Meyer* as focusing only on the impact of "imposing *Bivens* liability directly upon federal agencies." *Ibid.* That truncated analysis of the effect of increased liability was not sufficient. This Court's "*Bivens* line of cases reflect a sensitivity to varying contexts," and "[t]he range of concerns" that may be taken into account is "broad." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 280 (1997). See also 403 U.S. at 407 (Harlan, J., concurring) (noting the "broad" range "of policy considerations" the Court "may take into account"). In this context, the increased liability contemplated by the court of appeals would place inappropriate burdens on important federal programs and improperly skew government decisionmaking.

Here, as in other contexts, "[t]he financial burden of judgments against" government contractors "would ultimately be passed through, substantially if not totally, to the United States itself, since * * * contractors will predictably raise their prices to cover, or to insure against" liability. *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 511-512 (1988). But here, unlike some other contexts, the increased costs to the government are of particular concern, and not merely because they represent a drain on the Treasury. For the past

two decades, all Community Corrections Centers have been operated by private contractors, and not the BOP. In 1984, Congress nonetheless established an express policy, embodied in 18 U.S.C. 3624(c), that "to the extent practicable" prisoners serve a "reasonable part" of the last ten percent of their sentences (but no more than six months) in such environments, to "afford [them] a reasonable opportunity to adjust to and prepare for * * * re-entry into the community." In an era of limited budgets, a judicial decision that increases the cost of placing inmates in Community Corrections Centers may affect the extent to which it is "practicable" to achieve Section 3624(c)'s goal: The BOP could be forced either to acquire its own community-based facilities or to reduce the period of time prisoners spend in such facilities, with a corresponding increase in the time prisoners must spend in already over-capacity but mostly government-run (and hence less costly) secure facilities.[16] The broad range of concerns the Court may consider when deciding whether to extend *Bivens* surely encompasses the potential adverse impact on such an important federal program—a program associated with a 35% reduction in recidivism, Saylor & Gaes, *Training Inmates Through Industrial Work Participation and Vocational and Apprenticeship Instruction*, 1 Corrections Mgmt. Q. 32, 39-40 (1997)—and on the efficient operation of the prison system generally. The Court should be particularly hesitant to extend a judicially created remedy where, as here, the resulting financial burden has the potential of impeding an explicit congressional policy.

In addition, a more expansive *Bivens* remedy on the part of privately housed prisoners would distort the govern-

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[16] The BOP advises that, even without the imposition of *Bivens*-like liability on contractors, the marginal cost of housing an additional inmate in existing secure facilities is lower than the cost of placing that inmate in a Community Corrections Center.

ment's decisions regarding whether and under what circumstances to contract with private providers for the housing of federal prisoners. Congress has consistently expressed a policy of including private facilities among the available options for prisoner housing. See, *e.g.*, National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, Subtit. C, § 11201(c), 111 Stat. 734, as modified, D.C. Appropriations Act of 2001, Pub. L. No. 106-553, § 115, 114 Stat. 2762A-68 (42 U.S.C. 4001 note). In determining whether to use public or private facilities for particular prisoners or functions, the government to date has appropriately focused on considerations of quality and efficiency—that is, the cost and quality of the confinement facilities and program support for the inmate population. This Court should not distort that calculus by imposing additional costs in the form of corporate liability on private facilities alone.

D. The Court Of Appeals' Reliance On 42 U.S.C. 1983 Was Misplaced

Finally, the court of appeals' decision to create a *Bivens*-like damages remedy against private correctional corporations was "influenced strongly" by the fact that liability under 42 U.S.C. 1983 extends to private corporations acting under color of state law. Pet. App. 12a (citing *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922 (1982)). That reliance on Section 1983, however, was misplaced. The damages remedy under Section 1983 was created by Congress, and the scope of liability under it is therefore a question of statutory construction. Consequently, when this Court construed that statute as creating limited liability for municipal corporations in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), the Court relied on Section 1983's language and unique legislative history. In particular, the Court emphasized Section 1983's imposition of liability on any "person"—a term that has been understood to include legal persons like

corporations. *Id.* at 688-689. Moreover, as the Court explained, the text of Section 1983 provides an express standard of vicarious liability. It creates a cause of action not only against anyone who "subject[s] another" to a constitutional deprivation, but also against anyone who "cause[s]" another "to be subjected" to such a deprivation. *Id.* at 690-692. Viewing that language in light of Section 1983's legislative history, the Court interpreted Section 1983 as rendering municipalities liable for the constitutional deprivations they "cause"—*i.e.*, those deprivations committed by municipal agents pursuant to an "official policy." *Id.* at 691-692. Following that decision, the lower federal courts have similarly concluded that private corporations engaging in state action may be liable under Section 1983 to the extent the deprivation results from the corporation's unconstitutional policies. See, *e.g.*, *Austin* v. *Paramount Parks, Inc.*, 195 F.3d 715, 727-728 (4th Cir. 1999); *Sanders* v. *Sears, Roebuck & Co.*, 984 F.2d 972, 975-976 (8th Cir. 1993); *Rojas* v. *Alexander's Dep't Store, Inc.*, 924 F.2d 406, 408 (2d Cir. 1990), cert. denied, 502 U.S. 809 (1991); *Iskander* v. *Village of Forest Park*, 690 F.2d 126, 128 (7th Cir. 1982). See also *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936-937 (1982).

That reasoning, however, has no place under *Bivens*. The damages action against federal officers recognized by *Bivens* was judicially inferred to fill a perceived remedial gap and to enforce a constitutional mandate. While it bears some resemblance to the remedy against state officers that Congress provided in Section 1983, this Court's decision in *Meyer* implicitly rejected the claim that *Bivens* and Section 1983 actions are precisely parallel. In *Meyer*, the Court refused to infer a cause of action against a federal agency notwithstanding *Monell*'s recognition that local government agencies can be liable under Section 1983. The statutory language and legislative history that informed *Monell* were irrelevant in *Meyer*—and are similarly irrelevant here—because the *Bivens* remedy is founded not on an Act

of Congress but on a judicial decision.[17] Consequently, when this Court decides whether to create or extend *Bivens* liability, it does not consult statutory text; instead, the Court consults the same policy considerations that underlay *Bivens* itself. See 403 U.S. at 407 (Harlan, J., concurring) ("The range of policy considerations we may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization."). As explained above, those policy considerations do not support creating a *Bivens* remedy against private correctional institutions in this context. See pp. 18-28, *supra*. Accordingly, the Court should decline to extend *Bivens*, just as it did in *Meyer*, 510 U.S. at 484-486; in *Chilicky*, 487 U.S. at 423; in *Chappell*, 462 U.S. at 298, and in *Bush*, 462 U.S. at 377.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[17] Of course, this Court has held that the scope of immunity defenses under *Bivens* is the same as under Section 1983. See, *e.g.*, *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999). But this case does not concern immunity; it concerns the scope of the *Bivens* remedy itself.

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In The

Supreme Court of the United States

CORRECTIONAL SERVICES CORPORATION,

Petitioner,

v.

JOHN E. MALESKO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS

The American Civil Liberties Union (ACLU) is a nation-wide, non-partisan organization of nearly 300,000 members, dedicated to preserving and protecting the Bill of Rights. The ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of prisoners.

Among the more recent cases in which the National Prison Project has represented prisoner petitioners or respondents in this Court are *Young v. Harper*, 520 U.S. 143 (1997); *Lewis v. Casey*, 518 U.S. 343 (1996); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Hudson v. McMillian*, 503 U.S. 1 (1992); and *Wilson v. Seiter*, 501 U.S. 294 (1991).[1]

STATEMENT OF THE CASE

In 1994, the Respondent John E. Malesko was a prisoner serving an eighteen-month federal sentence for securities fraud who had been transferred by the Bureau of Prisons to the Le Marquis Community Corrections Center in New York City, a halfway house operated by the Petitioner, Correctional Services Corporation ("CSC"). CSC is a publicly-traded for-profit prison corporation.[2]

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[1] No counsel for any party authored any part of this brief. No persons or entities other than the *amicus curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with the Court.

[2] CSC's revenues for the year ended December 31, 2000 were over $200 million. The company operates prisons, jails,

According to Mr. Malesko's complaint, he had been previously diagnosed with congestive heart failure. After CSC instituted a policy requiring all prisoners living below the sixth floor to use the stairs rather than the elevator, a CSC staff member ordered Mr. Malesko to climb the stairs to his living quarters on the fifth floor. In attempting to climb the stairs, he suffered a heart attack and fell, suffering head injuries. At the time, Mr. Malesko had not received his prescribed medication and was under medical orders not to engage in strenuous activities such as stair-climbing. As a result of his head injuries, he requires medical care and is unable to work.

Mr. Malesko filed suit against CSC. The United States District Court for the Southern District of New York dismissed the claim against CSC on the ground that corporations are not subject to suit for constitutional wrongs under the rule of *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Second

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halfway houses, juvenile "boot camps," and other secure facilities. CSC consists of three divisions: Adult Corrections, Community Corrections, and Youthful Offender/Juvenile Programs, the latter operating largely under the name Youth Services International, a juvenile prison company acquired by CSC. The combined corporation owns more than 32 facilities housing approximately 4,300 juveniles and 13 facilities housing approximately 4,700 adults. *See* CSC Annual Report, SEC Form 10-K (Apr. 2, 2001) 3-11, *available at* http://www.correctionalservices.com/Investors/investors.html (in SEC Edgar Database). The company was previously known as Esmor, Inc., but changed its name after reports of inmate rioting and abuses. *See infra* note 6.

Circuit Court of Appeals reversed, and this Court granted a writ of certiorari.

SUMMARY OF ARGUMENT

A central premise of *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), is that those who act in the name of the federal government possess "a far greater capacity for harm than an individual trespasser exercising no authority other than his own." *Id.* at 392-93. In *Carlson v. Green*, 446 U.S. 14 (1980), the Court extended *Bivens* to Eighth Amendment violations against federal prisoners. The *Carlson* Court rejected the argument that prison officials would be unduly inhibited in the performance of their duties if *Bivens* claims were allowed, *see id.* at 19, and determined that a *Bivens* remedy would be more effective than other available remedies in deterring constitutional violations. This is particularly true in the case of private prisons, where the existence of a *Bivens* remedy helps to reduce the financial incentive to sacrifice constitutional rights in order to reduce costs and increase corporate profits. Moreoever, none of the alternative remedies proposed by CSC or the United States is nearly as effective as *Bivens*.

Because of security concerns, prisons and jails are given authority over those they confine to a degree not otherwise tolerated under the Constitution. Moreover, prisons are closed institutions substantially shielded from public view and oversight. The unchecked power of those who run prisons, like all unrestrained power, results in abuses. Such abuses are particularly likely to occur in

private for-profit prison corporations, which are primarily focused on the bottom line, and which are even less subject to public scrutiny than publicly run prisons. These dangers have repeatedly materialized in the actual operation of private prisons, including those operated by the Petitioner, Correctional Services Corporation. Accordingly, for-profit prisons are even more likely than publicly-operated prisons to formulate policies that will result in constitutional violations.

For-profit prisons are also more likely than governmental agencies to respond to the incentives provided by potential liability for damages. Contrary to the argument of Petitioner and the government that allowing a *Bivens* action against for-profit prisons will inappropriately discourage privatization, recognizing the availability of a *Bivens* action will allow market dynamics, including the availability of corporate liability insurance, to strike the appropriate balance between the need for assertive actions by the corporation's employees and the need to prevent violations of the Constitution in the name of the government.

Petitioner and the government argue that for-profit prison corporations should be treated, for these purposes, like the federal agency in *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994), and thus are not subject to a *Bivens* claim. In *Meyer*, however, allowing suit directly against the FDIC would have been, for all practical purposes, indistinguishable from allowing suit directly against the federal government. That is plainly not true for a private prison. Likewise, none of the Court's other rationales for the decision in *Meyer* apply in this context.

In fact, for the present purposes, the Petitioner bears far more functional resemblance to the federal agents in *Bivens* than the federal agency in *Meyer*. A central insight of *Bivens* is that the potential divergence between the goals and objectives of the government and of its agents is a source of the abuse of rights. For-profit prisons acting on behalf of the government also have goals and objectives independent of the government's, and this divergence also supports recognition of a *Bivens* damages remedy. Moreover, particularly because for-profit prison corporations must already take into account financial liabilities resulting from their employees' violations of constitutional rights, allowing a *Bivens* remedy against for-profit prisons will not create a direct financial burden on the federal government any more than recognition of a *Bivens* action against federal employees who violate the Eighth Amendment does.

Aside from *Meyer*, neither of the other circumstances that have justified an exception to the *Bivens* rule are present here, because this case involves neither a comprehensive remedial scheme designed by Congress nor the unique structure of the military.

As Petitioner and the government concede, a corporation is subject to suit pursuant to 42 U.S.C. § 1983. There is no justification for applying a different rule to *Bivens* actions. Indeed, in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this Court allowed Section 1983 suits against corporations after noting that corporations are treated as natural persons "for virtually all purposes of constitutional and statutory analysis." *Id.* at 687. A warden of a federal prison is no less accountable for constitutional violations than the warden of a state

prison; a corporation that confines federal prisoners should be no less accountable for constitutional violations than a corporation holding state prisoners.

ARGUMENT

I. CORPORATIONS OPERATING FEDERAL PRISONS FOR PROFIT ARE SUBJECT TO *BIVENS* LIABILITY WHEN THEY VIOLATE THE EIGHTH AMENDMENT

A. *Bivens* Encompasses Private Prison Corporations That Violate the Eighth Amendment

A right without a remedy is no right at all. Accordingly, in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392 (1971), this Court recognized a cause of action that remains central to assuring that constitutional boundaries are observed by those purporting to act in the name of the federal government. The critical insight of *Bivens* is that those who act in the name of the federal government have a special capacity not possessed by private actors to misuse power:

> Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting – albeit unconstitutionally – in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.

Id. at 391-92. Had the opposing view prevailed in *Bivens*, the power of the Fourth Amendment to protect against abuses by federal agents would have been gravely undermined, because such abuses could have resulted in damages only to the extent that the constitutional violation was also a violation of state law. *See Bivens*, 403 U.S. at 393-94.

In *Carlson v. Green*, 446 U.S. 14 (1980), the Court extended *Bivens* to encompass violations of the Eighth Amendment produced when those acting under federal authority deny constitutionally required medical care to prisoners. In doing so, the Court rejected the view that "special factors" free prison officials from *Bivens* liability, because prison officials do not enjoy an independent status in our constitutional scheme, nor are they likely to be unduly inhibited in the performance of their duties by the assertion of a *Bivens* claim. *Carlson*, 446 U.S. at 19. The Court found that a *Bivens* remedy was available, even though the plaintiff there had an alternative remedy under the Federal Tort Claims Act, because the "FTCA is not a sufficient protector of the citizens' constitutional rights," *Carlson*, 446 U.S. at 23, and the *Bivens* remedy is "more effective." *Id.* at 20.[3] The Court emphasized that

[3] Here, no equally effective alternative remedy is available. The FTCA specifically exempts corporations such as CSC from its reach. *See* 28 U.S.C. § 2671 (1994) (excluding "any contractor with the United States" from the reach of the FTCA). If anything, the argument in favor of a *Bivens* claim is stronger on these facts than in *Carlson* itself. Petitioner, however, suggests four categories of "substantial remedial options" ostensibly available to Mr. Malesko. *See* Brief of Petitioner (Pet. Br.) at 13-18.

"the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose," *id.* at 21, and that "[i]t is

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First, Petitioner suggests that prisoners in Mr. Malesko's shoes could bring *Bivens* actions against the officers themselves. But Mr. Malesko himself was unable to identify the individual officers responsible for enforcing the CSC corporate policy that resulted in his injuries until after his claim was time-barred. *See Malesko v. Correctional Services Corporation*, 229 F.3d 374, 376-77 (2d Cir. 2000). His situation is far from unique. *See, e.g., Billman v. Indiana Department of Corrections*, 56 F.3d 785, 789 (7th Cir. 1995) (Posner, J.) ("Billman is a prison inmate. His opportunities for conducting a precomplaint inquiry are, we assume, virtually nil. The state's attorney smiled when we asked him at argument whether Billman would be given the run of the prison to investigate the culpability of prison employees for the rape.").

Second, Petitioner proposes the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12133 (1994), and the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. 1998), as potential substitutes for a *Bivens* remedy. *See* Pet. Br. at 14-15. However, the appropriate "inquiry is whether Congress has created what it views as an *equally* effective scheme. Otherwise the two can exist side by side." *Carlson*, 446 U.S. at 23 n.10. It is not at all clear that either statute would provide any remedy for Mr. Malesko, and obviously, neither statute would provide any remedy for complaints of excessive force, for a failure to protect from harm, or for violations of other Eighth Amendment rights that could be infringed by a for-profit prison.

Third, Petitioner argues that Mr. Malesko could file a state tort action. This alternative, however, was rejected by the Court in both *Bivens*, 403 U.S. at 394, and *Carlson*, 446 U.S. at 23 (emphasizing the federal interest in uniformity of remedies).

Fourth, Petitioner argues that additional "administrative or injunctive vehicles" are available. *See* Pet. Br. at 16-18. This Court, however, has rejected the argument that prison grievance systems, which are not created by Congress, displace *Bivens* relief. *See McCarthy v. Madigan*, 503 U.S. 140, 149-50 (1992). Finally, Petitioner cannot justify the claim that injunctive relief

almost axiomatic that the threat of damages has a deterrent effect." *Id.* As discussed below, the deterrent purpose is especially well-served when the defendants are for-profit corporations, who, like CSC, are under pressure to cut costs and maximize profits at the expense of constitutional rights, and where mechanisms for public oversight are greatly diminished. Such defendants are more likely to adjust their behavior in response to the incentives provided by the prospect of *Bivens* liability.

There is also no doubt that *Bivens* actions here are "judicially manageable," *Davis v. Passman*, 442 U.S. 228, 245 (1979), given the federal courts' long experience assessing Eighth Amendment claims involving damages. Likewise, because of the many administrative and judicial constraints on prisoner litigation,[4] applying *Bivens*

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pursuant to 28 U.S.C. § 1331 (1994) or Bureau of Prisons oversight could provide an effective alternative remedy. Since the harm done to Mr. Malesko is completed, for him, as for Mr. Bivens, it is "damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

[4] In 1996, Congress passed the Prison Litigation Reform Act ("PLRA"), which places many restrictions on prisoner litigation, including a number of provisions that significantly discourage the filing of damages actions. For example, 42 U.S.C. § 1997e(a) (Supp. 2000) requires prisoners seeking only money damages to exhaust administrative remedies, regardless of whether the grievance system at issue allows for the award of monetary relief. *See Booth v. Churner*, 121 S. Ct. 1819 (2001). 42 U.S.C. § 1997e(e) (Supp. 2000) bars damages actions that seek an award for mental or physical injury suffered by a prisoner absent a prior showing of physical injury. The same limitation applies to claims filed under the Federal Torts Claims Act. *See* 28 U.S.C. 1346b(2) (Supp. 2000). The "three strikes" provision of PLRA prevents a prisoner who has had three actions dismissed as

here will not inordinately tax the dockets of the federal courts. *See Davis*, 442 U.S. at 248.

Since *Carlson*, this Court has never questioned the proposition that *Bivens* liability provides a remedy for violations of the Eighth Amendment committed by agents of the government. *See Farmer v. Brennan*, 511 U.S. 825 (1994); *McCarthy v. Madigan*, 503 U.S. 140, 150-52 (1992). The rule of *Bivens* is no less appropriate when the Eighth Amendment is violated by private corporations that, under contracts with the federal government, operate prisons for a fee.

B. *Bivens* Actions Are Particularly Appropriate Against For-Profit Prison Corporations

1. For-Profit Corporations Wielding Governmental Power over Prisoners Are Especially Prone to Abuse That Power.

"[P]risons and jails are inherently coercive institutions that for security reasons must exercise nearly total

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frivolous or malicious, or because the action fails to state a claim, from proceeding in a civil action unless the prisoner is in imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(g) (Supp. 2000). 28 U.S.C. § 1915(b)(1) (Supp. 2000) requires at least partial payment of the filing fee by a prisoner in all conditions of confinement cases in which the prisoner has any money in his or her prison account, or receives such funds in the future. 28 U.S.C. § 1915(e)(2) (Supp. 2000) sets up a special requirement that the district court review *sua sponte* any prison conditions case filed by a current prisoner, in order to determine if the claim on its face is frivolous, malicious, fails to state a claim on which relief may be granted, or seeks damages from a defendant who is immune from liability.

control over their residents' lives and the activities within their confines . . . ." *West v. Atkins*, 487 U.S. 42, 57 n.15 (1988). Moreover, this Court has repeatedly emphasized that prison officials must be accorded great discretion, allowing restrictions on the constitutional rights of prisoners that would never be tolerated in free society. *See Turner v. Safley*, 482 U.S. 78, 95 (1987); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977). When government decides to vest its power over prisoners in a for-profit corporation, that decision constitutes a formidable grant of authority. If a private company contracted with the government to deliver the mail, the potential for violation of constitutional rights would be more restricted. But there are few spheres, if any, in which comparable governmental power to control private citizens, and potentially to use force – including deadly force – is ceded to private entities.

Prisons are also in large part shielded from public scrutiny. *See Cleavinger v. Saxner*, 474 U.S. 193, 205 (1985) (noting that prisons, unlike public schools, are exempt from the safeguards against abuses provided by the opportunity for community observation); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 358 (1987) (Brennan, J., dissenting) ("Prisons are too often shielded from public view; there is no need to make them virtually invisible."). In particular, the media have very limited ability to monitor events and conditions in prisons. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) ("The public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter

these institutions."); *Pell v. Procunier*, 417 U.S. 817, 828 (1974). Private prison companies, by virtue of their corporate status and independence from the government, are even more impervious to public scrutiny. Unlike the Bureau of Prisons itself, private contractors who operate federal prisons may refuse to allow public investigation of their records, policies and finances.[5]

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[5] The Bureau of Prisons and other federal government entities are subject to intense scrutiny by coordinate branches of government, the media, and the general public. Because private prison corporations are not federal agencies, such monitoring is often not required, and prison contractors are able to avoid scrutiny. *See generally* Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. Mich. J.L. Ref. 249, 264-272 (1995) (explaining that statutory accountability measures do not cover private prison corporations).

Congress enacted the Freedom of Information Act (FOIA), the Administrative Procedures Act (APA) and the Government in the Sunshine Act, *see* 5 U.S.C. §§ 552, 552a-b (1994), in an effort to ensure that agencies and federal corporations are accountable to the public. These statutes require agencies to answer requests for information, to publish their rules and regulations, and to allow for public scrutiny of internal decisions and records. The basic purpose of such laws is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (discussing legislative purpose of FOIA). While the Bureau of Prisons must be in strict compliance with such laws, private prisons are exempt. *See* Casarez, *Furthering the Accountability Principle, supra*. The Bureau of Prisons is also subject to review concerning both financial and budgetary decisions. The Office of the Inspector General has the power to review the "assets, liabilities, contracts, property, records . . . authorizations,

While policy-making officials of the federal government are subject to channels of political accountability that operate independently of market forces, there are few comparable curbs on the power of the corporate entity. *See Nixon v. Fitzgerald*, 457 U.S. 731, 757 (1982), (discussing "formal and informal checks and balances," including scrutiny by the press and oversight by Congress, that prevent misconduct by the Executive). Business corporations are accountable chiefly to their stockholders and financial interests, rather than to the public interest. *See Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) ("There should be no confusion [about] the duties which Mr. Ford conceives that he . . . owe[s] to the general public and the duties which in law he [owes

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allocations, and other funds" used in the Bureau of Prisons. 5 U.S.C. app. 3 § 9 (1994 & Supp. 2001).

Government-controlled corporations are subject to a range of oversight mechanisms that are inapplicable to private prison corporations. Wholly-owned federal corporations are subject to reviews similar to those required of agencies, and are usually subject to public disclosure statutes. *See* FRANCIS J. LEAZES, ACCOUNTABILITY AND THE BUSINESS STATE: THE STRUCTURE OF FEDERAL CORPORATIONS 103 (1987) (explaining the different forms of oversight for entities performing government functions). Mixed ownership government corporations are also regulated. They are audited by the General Accounting Office, and during these audits may be required to submit all "books, accounts, financial records, reports, files, workpapers, and property" of the corporation. 31 U.S.C. § 9105 (1994). In addition, annual management reports must be submitted to Congress. 31 U.S.C.A. § 9106 (1994).

Absent such accountability, the availability of *Bivens* relief, with the accompanying judicial and public scrutiny, is even more critical.

to the stockholders]. A business corporation is organized and carried on primarily for the profit of the stockholders."). When business corporations operate prisons, the pressure to cut costs and maximize profits will be at odds with the imperative to provide constitutionally adequate conditions of confinement so long as the costs of noncompliance with the Constitution remain low.

In the prison, perhaps more so than in any other context, unchecked power leads to the abuse of individual rights. "[C]onfinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government." THE FEDERALIST NO. 84, at 252 (Alexander Hamilton) (Encyclopedia Britannica ed., 1952) (*quoting* 1 William Blackstone, Commentaries *136); *cf. Bowsher v. Synar*, 478 U.S. 714, 738 n.1 (1986) (Stevens, J., concurring). ("*Power and strict accountability of its use* are the essential constituents of good government.") (citation omitted). Given the extraordinary nature of the potential for misuse of power by those who operate private prisons, provision of a remedy for such misuse is particularly imperative.

Concerns that private prison corporations will misuse governmental power are not based solely on conjecture. Experience with the actual operation of private prisons – including the facilities operated by Correctional Services Corporation[6] – proves that the dangers inherent

[6] Examples of the abuses reported in facilities operated by CSC are abundant. *See, e.g.*, David Jackson, *Broken Teens Left in the Wake of Private Gain, Tribune Investigative Report: How Troubled Youth Become Big Business* (Part 2 of 3), CHI. TRIB., Sept.

in the exercise of unchecked power have repeatedly materialized. *See, e.g.* HOUSE COMM. ON GOV'T OPERATIONS,

27, 1999 at 1 (reporting that revenues of CSC have increased seven-fold while facilities have experienced a multitude of problems, which include overcrowding, holding children beyond their release dates to increase the company's per-diem payments, allowing guards to stage gladiator-style matches between teenage boys, giving severely deficient medical care, failing to provide required psychological counseling and treatment, and underpaying staff); Teresa Mears, *Detainees Held by INS Say Jails Rife With Abuse*, BOSTON GLOBE, Aug. 2, 1998 at A22 (reporting that after INS canceled contract with Esmor due to rioting and numerous serious problems company changed its name to Correctional Services Corporation); Todd Richissin, *'Fight Club' Probed at Maryland Jail for Juveniles*, BALT. SUN, July 3, 2001 at 1A (finding guards instigated staged fights between teens with alcohol and drug abuse problems at CSC facility); Kate Shatzkin, *Cullen Audit Raises Concern, Maryland Probe Identifies Mismanagement at Juvenile Facility*, BALT. SUN, Nov. 18, 2000 at 1B (describing findings of state audit of CSC facility which included a pattern of understaffing, medical personnel with expired licenses, a lack of mental health services, three-month long waits for drug treatment, and a failure to provide education and job training to youths); Glenn Puit, *Inmate Warned of Trouble, Prison Staffer Says*, LAS VEGAS REVIEW-JOURNAL, June 13, 2001 at 10B (reporting that before riot involving nineteen boys took place CSC staff member was warned, but no preventative action was taken to stop the uprising); Bob Schober, *Twelve Probationers Pulled From Camp: Tarrant Judge Acts on Allegation*, DALLAS MORNING NEWS, May 19, 2001 at 38A (three former inmates at CSC facility had been awarded relief after filing suit against an employee for sexual harassment; a dozen more inmates were pulled after a guard was accused of having sex with an inmate); Carrie Johnson, *Guard Suspended After Escape*, ST. PETERSBURG TIMES, May 8, 2001 at 1 (CSC guard gave key to inmate, allowing three offenders to escape); Anthony Spangler, *Boot Camp Discourages Inmates' Illness Reports*, FT. WORTH STAR-TELEGRAM, Jan. 25, 2001 at 1 (describing death of an eighteen-

BUREAU OF PRISONS HALFWAY HOUSES: CONTRACTING OUT RESPONSIBILITY, H.R. REP. NO. 102-139, at 16-51 (1991) (summarizing multiple problems endemic in the Bureau of Prison's halfway house contracting program); Brief of Legal Aid Society of the City of New York as *Amicus Curiae*. Both the history of for-profit prisons and the current experience with such prisons underlines the grave dangers of brutality, mistreatment and mismanagement attendant to the privatization of the penal function.

2. *Bivens* Liability Is Necessary to Deter For-Profit Prison Corporations from Committing Constitutional Violations.

In *Carlson*, the Court emphasized that "the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose." 446 U.S. at 21. This aspect of *Bivens*'s

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year-old boy who developed pneumonia and was refused medical treatment despite obvious physical signs of his condition and requests for help; indicating this is a pattern at the CSC facility; describing previous death of a girl whose repeated headache complaints were ignored, and then who died of a brain aneurysm); Mark Brunswick, *Trial Set to Begin in Juvenile Abuse Case*, STAR-TRIBUNE (Minneapolis-St. Paul, MN), Apr. 3, 2000 at 1B (CSC counselor, who was paid $6.50 an hour, nightly sexually assaulted juveniles in the facility); Guy Coates, *Tallulah Prison Returning to State Control, Walkout of Eighteen Guards Influenced Decision*, NEW ORLEANS TIMES-PICAYUNE, Sept. 22, 1999 at A2 (guard walk-out, in which two hundred inmates were left alone was partly caused by low $6/hour wages paid to guards by CSC facility); Kit Miniclier, *Olney Springs Prison Agrees to Improvements*, DENVER POST, Apr. 27, 1999 at B01 (state recommended that CSC facility make 29 changes in procedure, training, equipment and design following inmate riot that required four state riot-control squads to be called in).

logic is especially compelling when the conduct sought to be deterred may be avoided by changes in corporate policy. Eighth Amendment violations often result from, or are exacerbated by, bad policymaking rather than the acts of renegade guards. *See, e.g., Janes v. Hernandez*, 215 F.3d 541, 542 (5th Cir. 2000) (per curiam) (holding county liable for injuries because policy of confining inmates of no known propensity for violence together with dangerous inmates created an unsafe jail); *Doe v. Washington County*, 150 F.3d 920, 922-23 (8th Cir. 1998) (upholding damage award against county for beating, rape and torture of juvenile by other juvenile detainees in county jail where there was a policy of tolerating severe overcrowding; "A government entity can be liable under section 1983 even though no government official was found personally liable."); *Anderson v. City of Atlanta*, 778 F.2d 678, 687 (11th Cir. 1985) ("[I]f the City of Atlanta had not utilized a custom, policy, pattern and/or practice of inadequately staffing the Pre-trial Detention Center, thus making it difficult for the officers to tend to the medical complaints of the detainees, Larry Anderson would not have died in Fulton County Jail."). Insofar as such policies benefit the financial bottom line, for-profit prison corporations are even more likely than government to formulate policies that will result in constitutional violations.

Private prison corporations are also more likely than government agencies to respond to the incentives provided by damage awards. As this Court recently concluded in *Richardson v. McKnight*, 521 U.S. 399, 412 (1997):

> The organizational structure [of private prison companies] is one subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide – pressures not necessarily present in government departments.

While *Richardson* concerned the liability of prison guards in private prisons confining state prisoners, the market dynamics are not materially different here.

The government, nonetheless, argues that *Bivens* liability for for-profit prison corporations will distort the operation of market forces, forcing privately operated prisons to absorb the costs of litigation from which the Bureau of Prisons would be shielded, and that this extra cost will make private prisons an artificially expensive option in comparison to Bureau-run facilities. This consequence, the government argues, will distort the choice to confine prisoners in a public or private facility, threatening the government's "privatization policy." *See* Brief of the United States as *Amicus Curiae* (U.S. Br.) at 27-28; Pet. Br. 30-31.

The government's argument should be given no weight in a system that historically and appropriately places a greater value on constitutional rights than on corporate profits. Indeed, requiring prison corporations to bear the costs of violating the constitutional rights of those they confine will allow market forces to operate appropriately. This Court recognized as much in *Richardson* when it declined to extend a qualified immunity defense to private prison guards in part because it concluded that market forces, including the availability of

insurance against the costs of possible civil rights violations,[7] would fairly balance the risk of staff timidity against the risk of civil rights violations. *Richardson*, 521 U.S. at 409-11. In explaining the balance it had struck, the Court noted: "Competitive pressures mean . . . that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement." *Id.* at 409. This is a positive result, not a negative result, as the government seems to assume.

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[7] Like the State of Tennessee in *Richardson*, the federal Bureau of Prisons requires all prison contractors to carry comprehensive liability insurance. *See* BUREAU OF PRISONS, STATEMENT OF WORK: COMMUNITY CORRECTIONS CENTERS (Dec. 2000) 8, *available at* http://www.bop.gov. CSC's Annual Report states that "[e]ach management contract with a governmental agency requires CSC to maintain certain levels of insurance coverage for general liability . . . and to indemnify the contracting agency for claims and costs arising out of CSC's operations." CSC Annual Report, SEC Form 10-K (Apr. 2, 2001) 12 (describing CSC's large general liability insurance and umbrella insurance policies, covering CSC and each of its subsidiaries). "Comprehensive insurance coverage increases the likelihood of employee indemnification . . . . " *Richardson*, 521 U.S. at 400. Moreoever, it is CSC's "general practice to indemnify individual employees who are sued in connection with matters arising within the scope and course of their employment, and which are not criminal in nature." *See* Letter from George B. Stasluk to Steven Pasternak 1 (January 11, 1999) (in Joint Appendix at 153-155, *Malesko v. Correctional Services Corporation*, No. 99-7995 (2d Cir. 2000)).

II. FOR-PROFIT PRISON CORPORATIONS DO NOT COME WITHIN THE *MEYER* EXCEPTION TO *BIVENS*

A. The Rationale for the *Meyer* Exception Does Not Apply to Private Prison Corporations

Petitioner's argument hinges on this Court's acceptance of the proposition that a for-profit prison that contracts with the federal government to take custody of prisoners should be treated for *Bivens* purposes as the equivalent of a federal agency.[8] Petitioner and the government both attempt to derive a rule from *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994), that *Bivens* applies only to "individual federal officers," not to entities. *See* Pet. Br. at 7-13; U.S. Br. at 18-20.

Meyer does not support this argument. Its holding that federal agencies may be sued under *Bivens* rests on a series of assumptions and considerations that do not

[8] Correctional Services Corporation is not a "federal agency" for any purpose relevant to this case. *See Logue v. United States*, 412 U.S. 521, 528 (1973) (holding that a county that contracted with the government to incarcerate federal prisoners was not a "federal agency" under the FTCA, which defines "federal agency" to exclude "government contractors;" even though the contract required the county to comply with Bureau of Prisons rules and regulations and to submit to government monitoring, the critical element in distinguishing an agency from a contractor is the government's power "to control the detailed physical performance of the contractor."); *cf. United States v. Orleans*, 425 U.S. 807, 808 (1976) ("The question here is not whether the community action agency receives federal money and must comply with federal standards and regulations, but whether its daily operations are supervised by the Federal Government.").

apply to a private prison contractor. *Meyer*, 510 U.S. at 484. First, the Court noted that its decision in *Bivens* to recognize a damage remedy against individual federal agents who violate the Constitution "contemplated that official immunity would be raised" to preclude a suit directly against the federal government. *Id.* at 485. Because Congress had waived the defense of sovereign immunity for constitutional torts applicable to the FDIC, *see id.* at 483, allowing a direct suit against the government would have worked an enormous expansion of *Bivens*. Indeed, allowing suit against the FDIC would have been, for all practical purposes, indistinguishable from allowing suit directly against the federal government. In contrast, a suit against a governmental contractor is simply not comparable, on either financial or policy grounds, to suit against the federal government itself.

Second, the Court assumed that the opportunity to bring constitutional tort actions against individual agents was sufficient to deter constitutional violations and that suit against the agency was unnecessary. *See id.* at 485. In this case, however, CSC is in an analogous position to the federal agent in *Meyer*, not the federal agency. One of the central insights of *Bivens* is that federal agents bring motivations and objectives to their work that are distinct from the goals of their employers, and that this divergence can give rise to the misuse of governmental power. *See Bivens*, 403 U.S. at 392. Federal contractors also bring their own objectives to the table, which create a similar risk of abuse. Specifically, a corporation contracting with the government will respond to "ordinary market pressures" that will shape the corporation's decisions,

including decisions with respect to actions that risk violating constitutional rights. *See Richardson*, 521 U.S. at 409-11.[9]

In this case, for example, the rule barring Mr. Malesko from using the elevator was not imposed by an ill-willed guard, but by corporate policy, most likely stemming from the additional costs entailed in providing sufficient staffing to allow prisoners with medical needs to use the elevator. Because the contract employees and the contractor pose separate risks that their independent objectives will give rise to a constitutional violation, *Meyer* is not analogous and the rationale for *Bivens* includes suit against the corporation itself.

Meyer's third rationale is that, if federal agencies could be sued directly for damages, plaintiffs would

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[9] In the language of neoclassical economics, the costs of aligning employees' or agents' incentives with those of their employer or principal are referred to as "agency costs" or "monitoring costs." *See generally* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J.FIN.ECON. 305, 305-10 (1976); Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L.REV. 4 (1987).

The "agency costs," when prison contractors make decisions for the sake of profit at the expense of their duty to provide constitutional conditions of confinement, are especially great. Indeed, the framers of the Eighth Amendment were "centrally concerned with the agency problem – the danger that government officials might attempt to rule in their own self-interest at the expense of their constituents' sentiments and liberty." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 82 (1998) (discussing origins of the Eighth Amendment cruel and unusual punishment clause in abuses by authorities in England).

always sue the agency in preference to individual employees in order to avoid a defense of qualified immunity. *See Meyer*, 510 U.S. at 485. This rationale is far less pertinent in the case of private contractors because there will frequently be reasons to include the contractor's responsible employees as defendants. It may be that only employees will be potentially liable, or there may be other reasons to name as a defendant the employee who actually caused the injury. In no case will there be an incentive to name only the corporation in order to avoid a defense of qualified immunity, because, under *Richardson*, corporate employees, unlike federal employees, are not entitled to raise a qualified immunity defense. *See Richardson*, 521 U.S. at 412.

The final rationale in *Meyer* is that "a damages remedy against federal agencies would be inappropriate even if such a remedy were consistent with *Bivens*" because it would create "a potentially enormous financial burden for the Federal Government." *Meyer*, 510 U.S. at 486. Again, this rationale is no more applicable to federal contractors than it was to the federal agents in *Bivens*. Any financial consequences to the federal government from a suit against one of its contractors resemble the consequences of a lawsuit against a government employee based on an official action. In either case, those consequences would discourage potential employees from seeking such positions and would therefore require the government either to provide reimbursement for any potential damages, or to pay more to attract equally qualified candidates. Notwithstanding this potential indirect financial impact, the Court in *Bivens* allowed such

litigation to go forward because of the importance of ensuring fidelity to the commands of the Constitution.

Similarly, the possibility of damages against a private corporation could affect the price at which the corporation would be willing to contract with the government. But the effect would be even more diffuse than the effect of damages liability on recruiting government employees because, in most circumstances, the corporate employees would also be potentially liable for damages. Corporations operating federal prisons, such as CSC, may and often do indemnify their employees for the costs of litigation, and are required by the Bureau of Prisons to maintain comprehensive insurance coverage. *See supra* note 7; *cf. Richardson*, 521 U.S. at 409-11 (assuming that the costs of contractor staff liability for constitutional wrongs will be passed onto the contractor directly). Moreover, although a private corporation may respond directly to these economic pressures, such pressures to comply with the Constitution are not in tension with governmental goals. As noted above, recognizing a damages remedy against private prison companies that violate the Constitution will provide such companies with appropriate incentives to take necessary security measures. *See supra* at 18-19.[10] Finally on this point, the government's

[10] Moreover, the potential impact on government policy is no different if government contractors, as well as government employees and contract employees, are potentially subject to liability for constitutional torts. If anything, there is less possibility that liability will produce excessive timidity in governmental decision-making when the potential liability involves contractors rather than direct governmental employees. *See Richardson*, 521 at 409-11.

purpose in delegating its traditional penal function cannot legitimately be to allow a corporation to violate the Constitution in the name of the government, whether such violation would save the government money or not.

While a decision in *Meyer* to expand *Bivens* to include suit directly against the federal government would have worked an enormous and unprecedented change in our constitutional system, this case is completely different. For these purposes, CSC resembles a federal agent carrying out the directives of the federal government under contract, not a federal agency. In the courts below, CSC claimed that it was entitled to governmental immunity by virtue of its status as a government contractor. *See Malesko v. Corr. Servs. Corp.*, 229 F.3d 374, 381-82 (2d Cir. 2000). It lost that claim in the Second Circuit, and did not seek review of that issue here. Notwithstanding the rejection of that claim, what CSC seeks here is, in effect, to shield itself with the government's own immunity. The Court's decision in *Meyer* presents no rationale for granting such a shield to a private corporation.

B. The Other Exceptions to *Bivens* Are Irrelevant Here.

This Court has recognized two "judicial exception[s]" to the remedy for violation of constitutional rights recognized in *Bivens*. *United States v. Stanley*, 483 U.S. 669, 709 (1987) (O'Connor, J., concurring in part and dissenting in part). Neither of these exceptions has any relevance here.

First, the Court has declined to extend *Bivens* where Congress has created a comprehensive remedial scheme to address the issue. *See Bush v. Lucas*, 462 U.S. 367 (1983);

Schweiker v. Chilicky, 487 U.S. 412 (1988). In *McCarthy*, the Court specifically distinguished those cases, in which "Congress had legislated an elaborate and comprehensive remedial scheme," from the situation of a federal prisoner seeking money damages for denial of medical care, for whom "Congress has enacted nothing." 503 U.S. at 152. Congress has created no such system for the constitutional violations of private prison corporations.

Second, the Court has found that "the unique disciplinary structure of the military establishment and Congress' activity in the field constitute 'special factors' " making a *Bivens* remedy inappropriate, *Chappell v. Wallace*, 462 U.S. 296, 304 (1983), especially given "the insistence . . . with which the Constitution confers authority over the Army, Navy, and militia upon the political branches." *Stanley*, 483 U.S. at 682. These "special factors" are not present in this case.

III. CASES ALLOWING SUIT UNDER SECTION 1983 AGAINST CORPORATIONS SUPPORT ALLOWING *BIVENS* SUITS AGAINST CORPORATIONS

There is no dispute that Section 1983 actions may lie against a corporation. Relying on *Monell v. Department of Social Services*, 436 U.S. 658, 688-89 (1978), CSC and the government argue, however, that *Bivens* actions should be treated differently from Section 1983 actions against corporations because the decision in *Monell* was based on the specific language of Section 1983. Absent this language, they contend, the *Bivens* cause of action does not include

corporations within its scope. The particular text of Section 1983 upon which this argument focuses is the language creating a cause of action against any person who "subjects" another to a constitutional violation or "cause[s another] to be subjected" to a deprivation of rights. The government argues that the only language in Section 1983 relevant to liability of a corporation is the language providing for liability against someone who "cause[s another] to be subjected to a deprivation of rights." *See* U.S. Br. at 28-30 (*citing Monell*, 436 U.S. at 690-92).

The problem with this argument is that the Court in *Monell* does not rely on the "causes to be subjected" language of Section 1983 to hold that a corporation is subject to suit. Rather, this Court allowed suit against a municipal corporation after noting that "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell*, 436 U.S. at 687. Consistent with this principle, this Court and the lower federal courts have uniformly held that corporations that act under color of state law are persons for purposes of Section 1983. *See, e.g., Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 925 (1982); *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 146 (1970).

Although the Court does analyze the "causes to be subjected" language of Section 1983, it does so to support its conclusion that a municipal corporation cannot be held liable absent a causal connection between a constitutional violation and a policy of the corporation. *See Monell*, 436 U.S. at 691. Moreover, the government does not suggest any reason why it should be significant for *Bivens*

purposes if an actor "subjects" another to a constitutional violation or merely "causes" another to be subjected to a violation. The critical point is the actor's causative role in the constitutional violation. Indeed, nothing in *Bivens* or its progeny indicates that a federal employee who directs another employee to violate a plaintiff's constitutional rights is exempt from a *Bivens* action. *Carlson* is instructive on this point. In *Carlson*, the mother of a federal prisoner who had died, allegedly because of a failure to provide necessary medical care, attempted to sue under *Bivens*. The defendants included the Director of the Bureau of Prisons and others who had "the power to transfer prisoners to facilities in any one of several States." *Carlson*, 446 U.S. at 25 n.11. Accordingly, the defendants before the Court included parties whose possible liability rested on proof that they had directed others to execute actions that deprived the prisoner of his Eighth Amendment right to medical care. The Court nevertheless recognized the existence of a *Bivens* action against the defendants.

More recently, the Court considered a case involving both a *Bivens* and a Section 1983 cause of action related to the actions of United States Marshals and sheriff's deputies in allowing members of the news media to accompany them in executing a warrant on a suspect. In *Wilson v. Layne*, 526 U.S. 603 (1999), the Court held that it was a violation of the Fourth Amendment for law enforcement officers to cause third parties to accompany the officers in the enforcement of an arrest warrant when the third parties did not act in aid of the execution of the warrant. Again, the claim against the officers was that they *caused others* to take actions that violated the Constitution, yet

nothing in the opinion suggests that the *Bivens* claim should be evaluated differently from the Section 1983 claim on this basis. Indeed, neither the petitioner nor the government points to any case in which the distinction between violating a constitutional right personally and ordering an agent to violate a constitutional right had any significance for determining whether the existence of a *Bivens* cause of action should be recognized.

In *Butz v. Economou*, 438 U.S. 478, 500-01 (1978), this Court noted that the "constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible" and that it made no sense to "protec[t] the warden of a federal prison where the warden of a state prison would be vulnerable[.]" It similarly makes no sense to subject a for-profit corporation to Section 1983 liability for its constitutional violations when the company happens to confine state prisoners, but protect the corporation from *Bivens* liability if it confines federal prisoners. *See also Carlson*, 446 U.S. at 22 (stating that the "constitutional design" would be "stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression") (*quoting Butz*, 438 U.S. at 504). A warden of a federal prison is no less accountable for constitutional violations than the warden of a state prison; a corporation that confines federal prisoners should be no less accountable for constitutional violations than a corporation holding state prisoners.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CORRECTIONAL SERVICES CORPORATION,

Petitioner,

—VS.—

JOHN E. MALESKO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Legal Aid Society of the City of New York is a private organization that has provided free legal assistance to indigent persons for nearly 125 years. The Society routinely represents clients in federal detention facilities and prisons, including private contract facilities. Many of our clients are immigrants detained by the Immigration and Naturalization Service. The Federal Defender Division of the Society represents indigent defendants charged with federal crimes at trial and on appeal, and in some post-conviction proceedings. In addition, through its Prisoners' Rights Project, the Society seeks to ensure that prisoners are afforded full protection of their constitutional and statutory rights. The Society routinely advocates on behalf of prisoners who suffer abuse, denial of medical care, and other mistreatment while in prison, and where necessary conducts class action litigation about prison conditions and mistreatment and brutality. The Society thus has a direct interest in safeguarding its clients' access to complete, meaningful remedies for violations of their constitutional rights during incarceration.

STATEMENT

While incarcerated for federal securities fraud, respondent John E. Malesko developed congestive heart failure and was prescribed daily medication. Joint Appendix (J.A.) at 10. On February 4, 1994, he was transferred to the Le Marquis Community Corrections Center in New York City, operated by

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[1]No counsel for any party authored any part of this brief. No persons or entities other than the *amicus curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with the Court.

petitioner Correctional Services Corporation ("CSC") , where he was housed on the fifth floor. *Id.* at 10-11. Due to his heart condition, he usually was permitted to use the elevator to reach his room, notwithstanding CSC policy requiring fifth floor residents to use the stairs. *Id.* at 11.

On March 18, 1994, Mr. Malesko notified CSC that his heart medication had run out, but CSC failed to refill the prescription. *Id.* at 12. Ten days later, a CSC guard refused to permit Mr. Malesko to use the elevator to return to the fifth floor for a head count and ordered him to use the stairs. *Id.*; Appendix to Petition for Certiorari (Pet. App.) 20a. Mr. Malesko suffered a heart attack on the stairs. J.A. at 12.

CSC, a for-profit corporation then named Esmor Correctional Services (Petitioner's Brief at ii), operated the facility under a contract with the Federal Bureau of Prisons.[2] Esmor/CSC opened the facility in 1991, and from the start exhibited serious management problems. John Sullivan, *Company Running Immigration Jails Had History of Troubles*, N.Y. Times, Jun. 20, 1995, at A1. Employee turnover in the first year was nearly 100%. John Sullivan & Matthew Purdy, *In Corrections Business, Shrewdness Pays*, N.Y. Times, Jul. 23, 1995 at A1. In April 1992, federal inspectors found that the facility had 30% fewer employees than the contract required, and that the building suffered from rodent infestation, exposed wiring and other safety problems. *Id.* BOP officials later found that sufficient food was not available to the inmates, and a former official of the company stated that the company cut

[2]Esmor changed its name in 1996 after a highly publicized disturbance at a facility it operated in New Jersey, which subsequently led to the revelation of a pattern of gross mismanagement and abuse of prisoners in it charge. *See* CSC Amendment 2, SEC Form S-1 Registration Statement at 4 (Sept. 9, 1996) (available at www.freeedgar.com, ticker symbol CSCQ); *see infra* at 11-12.

costs by failing to provide enough meals for inmates. *Id.* Also, several required programs such as vocational and drug treatment were not provided as the contract required. *Id.* In December 1993, it was discovered that the low-cost drug laboratory that Esmor/CSC had chosen for drug screening had performed the tests incorrectly and returned inaccurate results. *Id.* CSC ceased operations at Le Marquis in 2000. CSC Annual Report, SEC Form 10K at 10 (April 2, 2001) (available at www.freeedgar.com, ticker symbol CSCQ).

Mr. Malesko filed this action *pro se* on March 27, 1997 in the United States District Court for the Southern District of New York against CSC and John Doe defendants alleging violations of the Eighth Amendment, and seeking damages pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 20a. On February 2, 1999, he filed an amended complaint naming Jorge Urena, the guard who denied him use of the elevator. *Id.* The district court dismissed the claims against Urena as time-barred. *Id.* at 24a. The court dismissed the claims against CSC on the ground that a corporation could not be held liable under *Bivens*. *Id.* at 20a-21a. The United States Court of Appeals for the Second Circuit reversed, holding that CSC could be subject to liability under *Bivens*. *Id.* at 5a-12a.

SUMMARY OF ARGUMENT

There are few exercises of government authority more potent than incarceration. In the prison, government power is at its zenith, as the prisoner is entirely dependent upon his jailers to provide for his well-being and ensure his survival. Increasingly, federal and local governments are turning to private, for-profit corporations to carry out these functions and undertake the difficult task of overseeing the day-to-day operations of jails and prisons.

Experience shows that private prison corporations have persistently failed to carry out their duties in compliance with the Constitution and governing laws. Corporate policies rooted in cost reduction and profit maximization rather than sound correctional practices have led to egregious conduct towards prisoners, including beatings, assault, sexual harassment and denial of necessary services like medical care. These patterns of abuse often result from economic decisions made by corporate entities rather than individual line staff. Effective deterrence of these violations must recognize corporate responsibility for the policies and practices that violate the Constitution, and ensure that the entity that commits and benefits from constitutional violations can be held accountable.

The pattern of constitutional violations that has become the hallmark of prison privatization flows directly from the nature of the private prison market. Private prison corporations are subject to a range of incentives to violate the laws that have no counterpart in government-run prisons, and as corporate entities, they typically operate free from many of the legal constraints that curb abuse and corruption in public prisons. At the same time, they are subject to market-based competitive pressures to perform satisfactorily on their contracts. The corporate entity determines how to respond to these competing pressures by deciding whether to allocate resources to shareholders or to prison operations, and making operational decisions that have a critical impact on the prison's ability to carry out its mandate in compliance with the law. The track record of private prisons demonstrates that the market pressures on corporations to comply with the law have failed to deter unconstitutional conduct, due to the structural failure of that market to hold corporations accountable for unconstitutional conduct. Absent additional incentives to comply with the Constitution in carrying out their profit-seeking mission, private prison corporations can be expected to continue their

pattern of exercising their tremendous authority with little regard for the constitutional rights of prisoners.

ARGUMENT

I. Private Prison Corporations Commit Serious Constitutional Violations For Which *Bivens* Provides An Important Remedy.

In *Bivens*, the Court recognized that the exercise of governmental power carries with it a unique power to harm, and that the Constitution serves to limit the exercise of that power. 403 U.S. at 391-92. If those who wield federal authority are free to ignore these constraints with impunity, the constitutional limitations on government have no force. To that end, *Bivens* ensured that persons harmed by someone who, while acting pursuant to federal authority, violates the Constitution, have an effective remedy at law. *Id.* at 397.

In hiring private corporations to undertake the task of incarceration, the government has vested corporations with the type of authority that ordinarily rests with individual government agents. Exercising that authority, private corporations have been responsible for serious violations of prisoners' constitutional rights, often for reasons inextricably linked to their status as operators in a for-profit marketplace rather than as public servants. Such abuses are not deterred by rules placing liability solely upon the individual actors or line staff who implement the corporate policies. To deny prisoners who are harmed by violations of their rights a remedy against the entity that perpetuates and benefits from them — the corporate jailer — is to leave corporate power essentially unchecked in the extremely sensitive realm of treatment of incarcerated citizens. *Bivens* does not permit this result. And for the reasons we set forth below, the absence of such

constitutional restraints on private prison firms will lead to further constitutional violations.

A. Prison Privatization Has Historically Been Accompanied by Severe Mistreatment of Prisoners.

As this Court observed in *Richardson v. McKnight*, correctional functions in the United States "have never been exclusively public." 521 U.S. 399, 405 (1994). "Private individuals operated local jails in the 18th century. . . . and private contractors were heavily involved in prison management during the 19th century." *Id.* (citations omitted). Most notably, under the system of convict-leasing, practiced throughout the country but most entrenched in the postbellum South, prisoners were entrusted to the hands of profit-seeking private persons or entities. *See* Alexis M. Durham III, *Origins of Interest in the Privatization of Punishment: The 19th and 20th Century American Experience*, 27 Criminology 107, 119-120 (1989); David Shichor, *Punishment for Profit* 34-38 (1995) That system was notoriously brutal, with annual death rates under some lessees approaching fifty percent, and death rates over ten percent considered normal. Matthew Mancini, *One Dies, Get Another* 33-34, 66-67 (1996); Shichor, *supra*, at 36; *see also* W.J. Michael Cody & Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 Vand. L. Rev. 829, 830-39 (1987).[3]

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[3]*See also Weigel v. Brown*, 194 F. 652 (C.A.8 1912) (private prison contractor liable for unjustified whipping of prisoner); *Dade Coal Co. v. Haslett*, 83 Ga. 549, 550-551, 10 S.E. 435, 435-436 (1889) (convict recovers from contractor for injuries sustained while on lease to private company); *Boswell v. Barnhart*, 96 Ga. 521, 522-523, 23 S.E. 414, 415 (1895) (private operator of chain gang liable for death of misdemeanant due to "cruel treatment, exposure, neglect, excessive and unreasonable tasks"); *Tillar v. Reynolds*, 96 Ark. 358, 360-361, 365-366, 131 S.W. 969, 970, 971-972 (1910) (prisoner died of internal injuries after private jailer stripped him, placed him face down on log, and beat and whipped him).

In 1871, Texas authorities implemented one of the first modern-style privatization efforts after finding that Huntsville prison was not generating enough profits using convict labor. To cut costs, the state turned the entire penitentiary over to private interests. While this brought some fiscal savings for the state, "it also meant lessened security, increased brutality, and a deterioration of the physical facilities." Steve J. Martin & Sheldon Ekland-Olson, *Texas Prisons* 5-6 (1987). A state commission investigating the facility in 1875 found deplorable conditions. Three prisoners shared each five-by-seven foot cell, in filthy, vermin-infested conditions. Prisoners as young as nine years old were housed with adults. Prisoners were ill-fed and emaciated, and medical care was abysmal: the commission reported it was "at a loss for terms sufficiently strong to condemn as inhuman and unfit for the purpose, the place in the Penitentiary miscalled a hospital." *Id.* Whipping and torture were routine, notwithstanding state prohibitions on such punishment. *Id.* at 7. In 1876, there were 382 escapes and 62 prisoner deaths out of 1,700 prisoners. *Id.*

As a result of this record, in 1883 Texas ended the experiment with privatization and resumed direct control of the penitentiary, while still leasing prisoners to labor on prison-purchased farms. *Id.* Inmate deaths and escapes declined significantly. *Id.* at 8. In 1909, following another critical report, the state took full control of correctional functions. *Id.* Other states followed suit in abolishing privatization schemes like convict leasing, and for most of the 20th century, government assumed full responsibility for prison operation. *See* U.S. Bureau of Justice Assistance, *Emerging Issues on Private Prisons* 11 (2001) ("BJA"); Douglas McDonald, "Public Imprisonment by Private Means," *in* Roy D. King & Mike McGuire (eds.), *Prisons in Context* 29 (1994).

B. Contemporary Experience Demonstrates that Grave Constitutional Violations Continue in Private Prisons.

Private operation of secure prison facilities did not emerge again until the 1980s, although some community and less secure facilities had been privatized a decade or so earlier.[4] McDonald, *supra,* at 30. Since the 1980s, privatization has expanded rapidly. In the first six months of 2000, the number of prisoners in private facilities in the United States grew 9.1%, reaching 76,010 prisoners on June 30, 2000. U.S. Department of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2000*, March 2001, NCJ 185989, at 1, 4.

It is much debated whether privatization has achieved its goal of lowering incarceration costs; recent research has shown that, at best, results are mixed or show no advantage to privatization. *See* BJA, *supra,* at 22-27 (reviewing cost studies); U.S. General Accounting Office, *Private and Public Prisons: Studies Comparing Operational Costs and/or Quality of Service* 3, 7 (1996).[5] It is abundantly clear, however, that

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[4]The Immigration and Naturalization Service was one of the first agencies to privatize detention facilities, giving many of the industry's now-dominant firms an early lead in the private prison market. McDonald, *supra,* at 30; BJA, *supra,* at 12. Industry leader Corrections Corporation of America (CCA) incorporated in 1983, and now incarcerates 6% of the U.S. prison and jail population. "About CCA," www.http://www.correctionscorp.com/cca/info.html. Wackenhut Inc. entered the prison market by opening an INS detention facility in Denver, and is now the second largest firm in the field. Together these two firms accounted for 76% of the private prison market in the United States in 1996. Charles W. Thomas, *Private Adult Correctional Facility Census* 33 (10th ed. 1997).

[5]The GAO concluded that cost studies "do not offer substantial evidence that savings have occurred" in private prisons. GAO, *supra*, at 3. The report reviewed the five most comprehensive studies since 1991, and found that there was "little difference and/or mixed results" in operation costs at public and private facilities. *Id.* at 7-8.

private prison firms have committed many serious constitutional violations in their short existence, raising questions as to whether they can be relied upon to safeguard individual prisoners' rights.

Private prison firms have amassed an abysmal track record for violence. In a recent comprehensive survey of private and public facilities, the Bureau of Justice Assistance found that private prisons experience more major disturbances (e.g., riots, fires) and more inmate-inmate assaults than public prisons. BJA, *supra,* at 46, 48. Several prisoners and guards have died in private prisons as a result of the prison's failure to control these dangerous situations.[6] In comparable medium and low-security facilities, assaults on staff are more frequent in private facilities than in public. *Id.* at 52. In private facilities operated by all of the major private prison firms, including respondent CSC, staff have repeatedly been found to engage in brutality and neglect[7] and sexual assaults against

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[6]*See* John L. Clark, *Inspection and Review of the Northeast Ohio Correctional Center*, Nov. 25, 1998, ("Youngstown Report"), at 6, 15, (two homicides, 17 stabbings, assaults against inmates and staff at CCA facility); *id.* at 18 (homicide at CCA New Mexico facility in 1998, when known enemies brought out of cell in violation of separation order); Jean Christenson, *Isle Inmates' Rights Violated in Texas, Report Said,* Honolulu Advertiser, Jul. 30, 1998 (one prisoner died and 6 injured in serious disturbance attributed to inexperienced staff at private facility in Texas holding Montana and Hawaii prisoners); *see also* Rebecca Roybal, *Violence Not New at New Mexico Private Prisons,* Albuquerque Journal, Nov. 12, 2000 (pattern of violent uprisings at New Mexico private prison).

[7]*See, e.g., LeMoine v. New Horizons Ranch & Center*, 990 F. Supp. 498 (N.D. Tex. 1998) (12 year old died from heat exhaustion at private facility after being forced to haul rocks in 103 degree heat, while taking facility-provided medication that interfered with heat regulation);

prisoners.[8] Numerous escapes from private prisons have highlighted their often shoddy security, raising concerns about the safety in the communities in which they operate.[9]

Karen Brooks, *CSC Might Lose One*, Star-Telegram, Jan. 18, 2001 (18 year old died from untreated pneumonia at CSC boot camp in Texas in 2001); Youngstown Report, *supra*, at 6, 15 (excessive use of force and harsh treatment of prisoners by CCA senior managers); *Kesler v. King*, 29 F. Supp.2d 356, 360, 361 (S.D.Tex. 1998) (beatings and savage treatment of private prisoners); Jeff Jones, *Guards Hurt in Prison Riot*, Albuquerque Journal, Apr. 7, 1999, at A1 (private prison officials admit to covering up incidents of excessive force); Tim Hoover, *Ex-Guard Accused in Jail Beatings is Arrested*, Tulsa World, Apr. 7, 2000 (CCA guard in Oklahoma arrested for assault on 5 prisoners).

[8]*See, e.g., Giron v. Corrections Corp. Of America*, 14 F. Supp.2d 1245, 1246-47 (D.N.M. 1998), *aff'd in part, rev'd in part*, 191 F.3d 1281 (10th Cir. 1999) (rape of prisoner by CCA guard); Bob Schober, *Twelve Probationers Pulled From Camp*, Dallas Morning News, May 19, 2001, at 38A (prisoners at CSC boot camp awarded judgments for sexual harassment by CSC staff, other prisoners removed due to sexual abuse); Debra Barayuga, *Isle Inmates Sue for Alleged Rapes*, Honolulu Star-Bulletin, Nov. 2, 2000 (Hawaiian prisoners in CSC-operated Oklahoma facility raped by staff); James McNair, *Prison Operator Reacting to Problems and Criticism*, Miami Herald, May 15, 2000, at 10A (12 Wackenhut guards in East Austin, Texas indicted for having sex with female prisoners); Carla Crowder, *Sex Scandal Rattles Private Prison*, Denver Rocky Mountain News, Sep. 26, 1999 (15 female guards in CCA facility had sex with prisoners).

[9]*See* Youngstown Report, *supra*, at 5, 15-16 (detailing pattern of escapes from CCA facilities, including four high security prisoners from Tennessee facility in October 1998; six prisoners from Youngstown in July 1998; three murderers and two sex offenders from Arizona facility in October 1996; five prisoners from another Arizona facility in 1996; one prisoner from Arizona in 1996, by walking through front door with group of visitors); BJA, *supra*, at 47 (documenting 45 escapes from 14 private facilities in 1997); Daniel LeDuc, *Staff Faulted For Lapses at Md. Centers*, Wash. Post, Jul. 14, 1999, at A6 (CSC officials admit responsibility for escapes from Maryland facility due to failures of prison staff to follow

These patterns of abuse and mistreatment often stem directly from corporate failures to manage the prisons in a safe, secure manner. The inability or unwillingness of the small handful of corporate actors dominating the field to implement policies and direct resources to ensure that facilities are operated in accordance with constitutional standards has been amply demonstrated. Examples from some of the more well-documented incidents illustrates this problem.

1. In 1994, Esmor/CSC opened a facility in Elizabeth, New Jersey under contract with the INS to detain noncriminal aliens. Serious mismanagement and mistreatment of detainees was evident from the start, principally due to Esmor/CSC's failure to train its staff in correctional procedures, and its failure to provide sufficient guards to cover all security posts. INS, *The Elizabeth, New Jersey Contract Detention Facility Operated By Esmor, Inc., Interim Report*, July 20, 1995, at 5-7, 56 ("INS Interim Report"); Matthew Purdy & Celia W. Dugger, *Legacy of Immigrants' Uprising: New Jail Operator, Little Change*, N.Y. Times, July 7, 1996, at A1 (detailing early evidence of mismanagement of the facility). According to an INS investigation, Esmor/CSC guards physically abused detainees, shackled them without reason, stole their property, imposed arbitrary punishment on detainees not guilty of any infraction, and generally harassed detainees. Counsel for the immigrants reported serious problems obtaining access to clients, and repeatedly complained that immigrants were shackled during interviews. INS Interim Report, *supra*, at 5-7, 56; *see also Jama v. INS*, 22 F. Supp.2d 353, 358-59 (D.N.J. 1998) (deplorable conditions at facility); Ashley Dunn, *Harsh*

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procedures); Ashley Dunn, *Close Detention Center, Local Authorities Urge*, N.Y. Times, Jun. 20, 1005, at B4 (law enforcement find community safety compromised by mismanagement of CSC/Esmor facility).

Criticism of Detention Center, N.Y. Times, Jun. 19, 1995, at B4.

The poor conditions fueled a major riot on June 18, 1995. The staff, untrained to handle the emergency, ignored established security procedures to defuse disturbances, and fled the facility. As a result, a small group of detainees took over and destroyed much of the facility until local law enforcement regained control the following day. INS Interim Report, *supra*, at 56-61; Richard Perez-Pena, *Illegal Aliens Overrun a Jail in New Jersey*, N.Y. Times, Jun. 19, 1995, at A1. The facility remained closed for 18 months. CSC/Esmor sold its rights to the facility to the private Corrections Corporation of America (CCA) for $6.2 million, thus, according to CSC/Esmor's president, avoiding any "significant" financial loss due to the disturbances. Purdy & Dugger, *supra*, at B4.[10]

2. In May 1997, CCA opened a facility in Youngstown, Ohio to house over 1,700 District of Columbia prisoners. Within its first 14 months, the facility "experienced pivotal failures in security and operational management as a result of seriously flawed decisions by leaders of both CCA and DOC," according to a review commissioned by the U.S. Department of Justice after several highly publicized violent incidents at the facility. Youngstown Report, *supra*, at 5, 10. The review found "a pattern of flawed security attributable to both corporate and institutional management deficiencies" and concluded that "CCA repeatedly practiced inadequate correctional management." *Id.* at 55. In order to boost the occupancy rate

[10]Losing the contract on the Elizabeth facility apparently did not impede Esmor/CSC's growth, as it earned record revenues less than a year later. *Correctional Services Corporation Reports Second Quarter Operating Results*, Business Wire, Aug. 13, 1996. From 1992 to 1996, CSC's revenues nearly tripled. *Id.*

as quickly as possible, CCA did not screen prisoners to determine if they should be housed together in a medium-level facility, but rather "uncritically accepted" all prisoners, including numerous prisoners who should never have been housed together. *Id.* at 53. CCA managers employed brutal policies "well beyond common or necessary correctional practices," engaged in excessive use of force against prisoners, failed to maintain control over weapons, and failed to implement numerous security procedures. *Id.* at 5. As a result, there were two homicides, numerous stabbings, extreme levels of violence, and six escapes within the first 14 months. *Id.* Notwithstanding these severe security breaches, CCA failed to conduct any internal audit until required to do so by the federal government. *Id.* at 18. The review concluded, "Fundamental security was repeatedly compromised by the larger corporate structure's apparent inability to assure the implementation of adequate security in a newly opened facility and learn from major security breakdowns. . . . escapes might have been prevented had CCA implemented company-wide reviews or changes. . . . or if it had in place effective internal controls an security audit processes." *Id.* at 17.

3. In New Mexico, a pattern of violence in the state's Wackenhut-operated prisons came to a head in August 1999, with a major riot after two prisoners were stabbed and a guard murdered at the Guadalupe Facility. *The Consultants' Report on Prison Operations in New Mexico Correctional Institutions*, January 14, 2000 ("New Mexico Report") at E3. A state-appointed Special Advisory Group investigated the problems, and found serious flaws in the structure and management of the private prisons. The report found that "staffing issues and a lack of experience in both line and supervisory staff were particularly serious deficiencies" (*id.* at E14); that the facility contained serious design flaws that provided opportunities for violence (*id.* at E5); and that Wackenhut lacked proper methods

or systems for numerous basic correctional tasks, such as providing sufficient guard coverage of posts, assessing potential violence, classifying prisoners, managing gang intelligence, investigating misconduct, conducting security inspections, and numerous other problems. *Id.* at E4-5, E13-14. Investigators concluded that "the Wackenhut facility and staffing complement were not capable of managing inmates" housed there, and that "insufficient communication and mutual problem solving impeded a working relationship between New Mexico and Wackenhut from the beginning of the contract period." *Id.* at E-5.

4. The egregious abuse of juveniles in privately-operated facilities in Louisiana received widespread attention in the last several years, eventually forcing the state to resume control of all its juvenile facilities. In 1997, a U.S. Department of Justice investigation detailed widespread physical abuse of youth and poor conditions at the privately-operated Tallulah facility. U.S. Department of Justice, *Findings of Investigation of Secure Correctional Facilities for Juveniles in Louisiana*, Jun. 18. 1997 (available at http://www.usdoj.gov/crt/split/documents/lajuvfind1.htm). For example, DOJ found incidents of "guards beating up juveniles, including one child whose hands were cuffed behind his back who was bleeding heavily from the mouth, and guards macing youth while they were being held by other guards" and a guard beating a youth with both fists and hitting him in the head with a radio. *Id.*

At the Wackenhut-operated juvenile facility in Jena, Louisiana, a state court ordered several juveniles released due to the severe mistreatment they suffered at the facility. Fox Butterfield, *Private Company to Pull Out of Operating Troubled Prison*, N.Y. Times, April 27, 2000, at A2. Guards beat one youth so severely that his intestines protruded several inches into the colostomy bag he wore due to a prior gunshot

injury. NPR, March 16, 2000, Interview with Judge Doherty, Orleans Parrish, Louisiana; *see also* "I Know Why the Cajun Bird Sings," *Harpers*, July 2000, at 29-30. In a two-month period, 25% of the juveniles were "traumatically injured," often by guards who had not been taught non-injurious techniques of controlling inmates. *Harpers, supra*, at 29. Youths were kept in solitary confinement for months, deprived of medical care, and denied shoes and blankets during the winter. Fox Butterfield, *Privately Run Juvenile Prison in Louisiana is Attacked for Abuse of 6 Inmates*, N.Y. Times, March 16, 2000, at A14. Following extensive press coverage of the abuses, the state took over operation of the Jena facility in April 2000. Butterfield, *Private Company to Pull Out of Operating Troubled Prison, supra*.[11]

5. In 1996, Capital Correctional Resources, Inc. (CCRI) leased part of the Brazoria County, Texas Detention Center to house inmates from Missouri. *Kesler v. King*, 29 F. Supp.2d 356, 360, 361 (S.D.Tex. 1998). CCRI staffed the facility with inexperienced and poorly qualified guards, including two guards with criminal convictions for beating inmates. *Id.* Although the contract required local authorities to oversee hiring and training, the *only* training guards received was in opening and closing cellblock doors. *Id.* at 362.

Shortly after the facility opened, guards conducted a violently abusive raid that was captured on videotape. *Id.* at 362. Prisoners in their housing areas were forced to strip naked, endure body and cavity searches, and crawl on their stomachs, while they were kicked and stomped on by one of the

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[11]The United States and private plaintiffs settled lawsuits arising from these and other abuses at the Louisiana juvenile facilities, and control of the facilities returned to the state. *Williams v. McKeithen*, 121 F. Supp.2d 943 (M.D.La. 2001) (approving settlement agreement).

guards with a prior conviction for beating prisoners. *Id.* at 363. The officers repeated these tactics in other housing areas, deploying tear gas and unleashing dogs who mauled several prisoners. *Id.*; *In re Tex. Prison Litig.* 191 F.R.D. 164, 166-67 (W.D.Mo. 1999). For months, CCRI officials and local authorities engaged in a pattern of cover-ups and lies about the incident. *Kesler*, 29 F. Supp.2d at 363-364. For example, CCRI refused to provide information or turn over the videotape to the Missouri correctional authorities. *Id.* CCRI also ignored or destroyed numerous prisoner grievances alleging excessive force by the CCRI guards. *Id.* at 365. The cover-up was successful until numerous television stations received the videotape and broadcast the tape months later. *Id.*

II. Adequate Remedies Against Private Prison Firms are Critical Given the Structural Features of the Private Prison Market that Encourage Constitutional Violations.

Although public prisons are the site of constitutional violations every bit as repugnant as the examples from private prisons, unique features of privatization give rise to a propensity for constitutional violations in private prisons. The private corporation's diminished accountability to the public, and its economic incentive to increase profits by cutting costs to the extent permitted by the market, encourage private prisons to ignore the constraints of the Constitution. These incentives operate most directly upon the corporation rather than its individual employees, driving corporate policy decisions — such as adequate recruitment and salaries, training in professional corrections techniques, sufficient staffing of facilities, and the availability of programs to prisoners — that significantly affect the conditions of confinement and treatment

of prisoners.[12] Experience has shown that neither liability of individual line staff nor the competitive pressures of the private prison market are sufficient to counteract these incentives on firms to engage in unconstitutional conduct. Effective deterrence of constitutional violations must recognize corporate responsibility for violations and provide the corporations with an incentive to operate within the bounds of the Constitution.

1. Private Prisons' Diminished Accountability Fosters Abuse.

The coercive authority granted to prisons, both public and private, is rendered even more potent by the closed, isolated world in which it is exercised. As the Court has recognized, while "supervision by the community afford[s] significant safeguards against abuse" in other institutions, "there is little, if any, protection by way of community observation" in prisons. *Cleavinger v. Saxner*, 474 U.S. 193, 205 (1985). When accountability is diminished, constitutional violations are more likely to occur.

Several mechanisms operate in the public realm to offset the prison's isolation and ensure that prison officials are

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[12]While employees have an interest in the firm's success insofar is it affects their job security, corporate cost-cutting measures are often adverse to the individual employee's interests. Prison guards have a paramount interest in ensuring that their facility is orderly and secure, and that fellow staff are well-trained in controlling prisoners. Private prison guards have persistently reported that their mission has been compromised by corporate decisions resulting in short-staffing, over-reliance on overtime, and unsafe working conditions. *See, e.g.*, Rebecca Baker, *Guards Blast Prison on TV Show*, Tribune Chronicle-Warren Ohio, Jul. 31, 1998 (guards at Youngstown describe grossly inadequate training); Carla Crowder, *Sex Scandal Rattles Private Prison*, Denver Rocky Mountain News, Sep. 26, 1999 (female guards in short-staffed prison required to oversee 288 male inmates in three housing areas).

held accountable to the public to some degree. These range from traditional political and community influence over prison administration, to the array of civil service regulations governing hiring and performance in public jobs, to laws that require government to reveal information about its operations.[13] These constraints are largely absent from private prisons for several reasons.

The nature of the private prison market as it currently operates profoundly disrupts the political links among the community, prisoners, and the correctional agency that oversees the prisoners daily existence. While prisoners have long been incarcerated in prisons geographically remote from their communities of origin, host communities of public prisons had ready means to determine "who was in charge" of facilities and make clear their expectations of the treatment of prisoners therein. The modern private prison industry has dramatically altered this landscape by facilitating the practice of creating

[13]For example, the Freedom of Information Act, 5 U.S.C. § 552, and similar state laws ensure public access to government information on a scale without parallel in the private sector. By its terms, FOIA applies only to federal "agencies" (5 U.S.C. §552 (1988)), and records they create or retain. *Forsham v. Harris*, 445 U.S. 169, 180 (1980); *Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136, 152 (1980). In addition, FOIA contains a broad exemption for confidential "trade secrets and commercial or financial information" (5 U.S.C. §552(b)(4)) that would likely preclude disclosure of important information about private prisons. Not surprisingly, private prison firms have repeatedly refused to reveal information about their operations on the grounds that it constitutes proprietary information. *See, e.g.*, Alan Clendenning, *Wackenhut's Troubles Continue*, Associated Press, May 22, 2000 (Wackenhut refuses to disclose governments from whom it sought contracts to fill Jena, Louisiana facility after state officials closed it); Karen Testa, *ACLU Sues to Get Wackenhut-Run Prison's Records*, Miami Herald, June 6, 1999, at 2B (Wackenhut-run facility refused to provide records pursuant to state public records laws, admits to refusing to provide records in other facilities).

prisons "on spec" — that is, locating prisons in communities seeking economic development, building them without a contract for prisoners, then filling them with prisoners from multiple outside jurisdictions, with no connection to local correctional agencies.[14] Multinational corporations, rather than local correctional agencies, become the jailers and decisionmakers on crucial issues such as staffing and security; the prisoners are no longer errant members of the community, but are strangers to it. While communities that host private prisons may, in theory, try to influence whatever distant governmental entity contracts with the private prison, such mechanisms are vastly more uncertain and attenuated than traditional local community oversight. *See, e.g.*, Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 631 (2000).

Private prisons thus typically operate outside of the existing structures that monitor government prisons to ensure accountability. They are not, for example, subject to internal affairs or other monitoring capabilities of departments of correction or other state or local oversight bodies.[15] Although the contracting government (for example, a state Department of Correction) is typically permitted to monitor performance of the private prison, other oversight agencies, including those

[14]*See, e.g., Evans v. Holm*, 114 F. Supp.2d 706, 708 (W.D. Tenn. 2000) (CCA facility in Tennessee houses federal detainees and state inmates from Wisconsin and other states); *Luong v. Hatt*, 979 F. Supp. 481, 483 (N.D. Tex. 1997).

[15]For example, in New York City, there is a Board of Correction that inspects city jails and promulgates minimum standards for many aspects of jail operations, including medical care. New York City Charter § 626. There is also a New York State Commission of Correction, with regulatory authority over state prisons and local jails. N.Y. Const., art. XVII, § 5; N.Y. Correction Law §§40, 45. Private facilities that do not hold New York prisoners would not be subject to these laws.

that would typically oversee the contracting agency as well (e.g., an inspector general) lack jurisdiction to monitor the private facilities. *See Richardson*, 521 U.S. at 409-10 (noting lack of statutory oversight of Tennessee private prisons as compared to public prisons). For example, CCA's Youngstown facility was not subject to any oversight by the host state, since no Ohio corrections law or regulation governed private facilities, and the Ohio Department of Corrections was in no position to monitor the performance of the contracting government, the District of Columbia's Department of Corrections. James E. Roberts, *City of Youngstown Learns Oversight Lesson the Hard Way*, Correctional Law Reporter, December/January 2000, at 55-56; Pam Belluck, *As More Prisons Go Private, States Seek Tighter Controls*, N.Y. Times, Apr. 15, 1999, at A1 (describing lack of oversight of private prisons); *cf.* Ohio Rev. Code Ann. §9.07 (Baldwin 2001) (enacted March 17, 1998 in response to Youngstown problems to set standards for private facilities). When Ohio authorities sought access to the facility to investigate the disturbances, CCA denied them admission. Youngstown Report, *supra*, at 22; Mark Tatge, *Inspectors Question Youngstown Prison Access*, Plain Dealer, May 9, 1998, at B4. There was no significant oversight of the facility until, at the Ohio governor's request, the U.S. Department of Justice ordered an independent review. Youngstown Report, *supra*, at 23.[16]

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[16]In other instances, private prisons and contracting governments have resorted to byzantine arrangements to circumvent the accountability functions of public procurement procedures. In New Mexico, when state officials declined to accept Wackenhut's proposal to operate state facilities, Wackenhut contracted directly with individual counties, which are not subject to the state procurement code, to run their local jails. New Mexico Report, *supra*, at E-18. The counties then separately negotiated with the state to fill those jails with state inmates. *Id.* Thus, although the jails functionally served as state prisons, and never housed county inmates, they were not subject to established state controls and accountability.

On a larger scale, employees of public agencies and private corporations are subject to fundamentally different legal regimes that dictate their loyalties and accountability to the public. For example, federal public employees are subject to a myriad of laws designed to protect the integrity of the government: officials are bound by strict nepotism rules in hiring (5 U.S.C. §§2302(b)(6)- (7); 5 U.S.C. §3110); they are criminally liable for willfully interfering with the hiring process (18 U.S.C. §1917); and they can be subject to criminal sanctions for falsifying an employment application. 18 U.S.C. §1001. Extensive ethics laws prohibit conduct that conflicts or appears to conflict with the government's public interest, or provides for personal gain incompatible with government service. 5 C.F.R. §2635.101(a); *see also* 18 U.S.C. §§201- 209. Private actors are not constrained by these laws — indeed, to privatization advocates, freedom from such civil service requirements may be considered a *benefit* of privatization. Instead, corporate officials are constrained in the first instance by their fiduciary duty to act in the interest of the corporation and its shareholders. *See, e.g., United States v. Bynum*, 408 U.S. 125, 137-138 (1972). To the extent that the corporate interest is not co-extensive with the public interest, the corporate actor has a duty to act without regard to the public interest.

Moreover, publicly employed guards and personnel are protected in a variety of ways from retaliation for exposing abuses. Prison guards employed by the Federal Bureau of Prisons, for instance, cannot be terminated from employment without cause. *See* 5 U.S.C. §7513. The Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16 (1989), also affords them a significant degree of protection from retaliatory actions should they disclose unlawful conditions or official

misconduct.[17] But corporations remain largely free to terminate employees who expose corporate wrongdoing, since the overwhelming number of non-public employees are employed at will. Facing termination for exposing unlawful treatment of prisoners poses a clear disincentive for employees to bring abuses to light, and provides corporations with a freedom from scrutiny not found in the public sector.

2. Private Prison Firms Face Unique Economic Incentives That Often Clash With Safeguarding Prisoners' Rights.

As profit-seeking enterprises, private prisons are subject to incentives to cut costs that are generally absent in the public sector. Indeed, these incentives are touted as the primary benefit of privatization, permitting private prisons to provide services more cheaply than the government can. Experience has shown, however, that private firms have often pursued profits to the detriment of prisoners' welfare.

One of the most widespread — and dangerous — cost-cutting methods deployed by private prison firms is to reduce labor costs by hiring fewer and less qualified staff, paying lower salaries, and reducing or eliminating critical staff training and oversight. Since labor costs account for roughly 75% percent of the overall costs of corrections, labor reductions can

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[17]Many former private prison officials maintain that they were fired or otherwise suffered retaliation for reporting mistreatment of inmates. *See, e.g.*, Carla Crowder, *Ex-Warden Says He'll Sue State*, Denver Rocky Mountain News, Apr. 26, 2000 (warden of troubled CCA facility in Colorado alleges he was fired for exposing CCA's failure to comply with contract); Rachel Horton, *Former Boot Camp Worker Issues Apology*, Dallas Morning News, Oct. 20, 2000, at 1A (former CSC employee alleges company sought to preclude him from testifying about sexual abuse of female inmates).

have a dramatic impact on short-term profitability. BJA, *supra*, at 16. Not surprisingly, many of the most serious violations that have been observed in private prisons have been attributed directly to the prison's failure to train staff or provide sufficient staff coverage. *See, e.g.*,; Youngstown Report, *supra*, at 7 (citing "the lack of correctional experience on the part of almost all staff, especially supervisors" who were "not yet sufficiently experienced and trained for their duties"); New Mexico Report, *supra*, at E3, E5, (attributing violence to prison firm's inability to recruit experienced staff due to low wages); Ken Kolker, *Changes Ahead for Troubled Prison*, Grand Rapids Press, May 20, 2000 (Wackenhut-operated youth facility more violent than state adult maximum security prison due to understaffing)[18]

Private prisons have also frequently been faulted for cutting costs by reducing the services mandated by their initial contracts or governing law. These include denial of needed medical services, such happened in January 2001 at CSC's Mansfield, Texas "boot camp", where an 18 year old prisoner died of untreated pneumonia. Anthony Spangler, *Boot Camp Discourages Inmates' Illness Reports*, Fort Worth Star-Telegram, Jan. 25, 2001, at 1. Similar cost-cutting measures were behind much of the mistreatment uncovered at Louisiana's juvenile facilities; the U.S. Department of Justice concluded that many of the serious violations it reported were "linked to the reluctance of Wackenhut Corporation to spend adequate funds to provide for the care of the youth." Butterfield, *Private Company to Pull Out of Operating Troubled Prison, supra*.

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[18]In 1997, the average starting salary for private correctional officers in 1997 was $17,415. U.S. Corrections Corporation reported the lowest average starting salary at $14,824; Wackenhut had the highest average salary at $18,785. BJA, *supra*, at 45.

Similarly, at Youngstown, the contract required the facility to provide sufficient programming to ensure every general population inmate had access to occupational training, work, education, drug treatment or other programs. Youngstown Report, *supra*, at 86. Outside auditors discovered that only 33% of inmates were employed, the vast majority for just a few minutes each day cleaning their housing area or distributing food trays or laundry. *Id.* Very few inmates participated in the school program, and those who did were in class at most six to eight hours per week. *Id.* at 86-87.

In addition to cost-cutting, firms have a financial incentive (and a duty to their investors) to boost demand for their services — that is, to keep enough people in prison as long as possible. On the political front, privatization thus has given corporations a potent incentive to direct their significant wealth to influencing important public policy debates about criminal justice, sentencing, and corrections issues — such as how to reduce recidivism (which benefits corporate actors), expand alternatives to incarceration, or design rational sentencing and penal policies. On the more day-to-day level of prison operation, the corporate interest in keeping the beds filled can result in violations of prisoners' constitutional rights. In one extreme episode, a CSC official ordered a CSC-operated juvenile facility in Florida to hold 10 juvenile prisoners five days past their release date solely in order to have the youths "counted" by the state in their twice-yearly census that determined CSC's funding. Tyler Bridges, *Detention Center Apologizes for Delaying Juveniles' Release*, Miami Herald, Jan. 8, 1999, at 5B.[19]

[19] *See also Blumel v. Mylander*, 954 F. Supp. 1547, 1555-56, 1557 (M.D. Fla. 1997) (CCA violated constitutional rights of detainee held 30 days on warrantless arrest without a determination of probable cause).

Even leaving aside such extraordinary measures, the prison's interest in maintaining a prison population may affect the imposition of discipline on prisoners. Infractions of prison rules are often punished by the forfeiture of "good-time" credits, or reductions in sentences that prisoners obtain by compliant behavior. *See, e.g.*, 18 U.S.C. §3624(b)(1) (federal prisoners serving sentences over one year and less than life may receive up to 54 days of good time credit annually for compliance with institutional disciplinary regulations). By finding prisoners guilty of infractions and denying them good-time credits, private prisons increase their profits by lengthening a prisoner's incarceration period. Private prison firms thus face a conflict between their interest in maintaining high capacity, and the prisoners' interest in ensuring disciplinary rules are propounded and applied fairly. A corporate employee sitting in judgment of prisoners' disciplinary infraction, knowing that an adverse ruling will keep that prison bed occupied for longer, may not be an impartial decision-maker.

Moreover, the corporation has an incentive to promulgate disciplinary rules for all of its prisons that result in more infractions — essentially a policy-level decision to boost the populations — and to encourage staff to apply the rules unfairly. For these reasons, the Court in *Richardson* found it "significant that. . . Tennessee law reserves certain important discretionary tasks — those related to prison discipline, to parole, and to good time — for state officials." 521 U.S. at 411-12. However, in many systems, private operators retain control over the disciplinary process, and thus, over the length of sentences of certain prisoners. *See* Warren L. Ratliff, *The Due Process Failure of America's Prison Privatization Statutes*, 21 Seton Hall. Legis. J. 371, 405-07, 414-16 & nn. 223-230 (1987) (surveying federal and state limits on private corporate control of prison discipline).

3. Competitive Market Forces Do Not Sufficiently Deter Abuse.

It is a commonplace argument that, given the competitive pressures of the private prison marketplace, firms will respect constitutional constraints in order to keep contracts, on the assumption that government will terminate the contract upon a finding of constitutional violations (or at a minimum, that the contract will be rendered more costly due to payment of judgments over the conditions). *See, e.g., Richardson,* 521 U.S. at 409. Regardless of whether the profit motive necessarily corrupts private incarceration endeavors, there are several reasons to believe that the market for private incarceration cannot be relied upon as a means of ensuring adherence to the Constitution.

First, the private prison market, in its modern form, is not the equivalent of a highly competitive commodity market. It is essentially oligarchic, overwhelmingly dominated by a few multinational corporations whose market shares have increased considerably at the expense of smaller competitors. *See* Thomas, *Private Adult Correctional Facility Census, supra* , at 33 (three firms occupy over 80% of market). As a practical matter, when one firm fails to meet its contractual obligations to a government, there are often at most only one or two other firms with the capacity to assume the contract.

Second, the assumption that governments will terminate contracts upon findings of unconstitutional conduct is not borne out in reality. Governments have typically tolerated unconstitutional conduct and substandard compliance in their private facilities until a major disturbance or some other high-profile event spurs them to take action. For example, prisoners at Youngstown filed a class action lawsuit detailing their mistreatment and unconstitutional conditions at the CCA

facility in August 1997, but it was not until several widely publicized murders took place six months later that any meaningful government oversight began. *See* Youngstown Report, *supra,* at 5, 7. Similarly, it took major riots before the contracting governments in charge of Esmor/CSC's Elizabeth facility and Wackenhut's New Mexico facilities to intervene. *See supra* at 11-14. Moreover, to the extent that government actors' decisions are influenced by factors other than the cost and performance of the prison — such as repaying political debts or satisfying a corporate constituency — they may be more likely to continue the contracting relationship despite poor performance by the contractor. *See Richardson,* 521 U.S. at 418-19 (Scalia, J., dissenting).

More critically, reliance on governmental termination of contracts (or renegotiation on less favorable terms) to deter constitutional violations depends entirely upon effective, comprehensive government monitoring and data collection. Yet such vigilant monitoring has been notably absent in the private prison context. As a threshold matter, contracting governments have an interest in keeping problems at the facilities from coming to light, given that violations by the contractor will also be attributed to the government that hired it. But even apart from this political disincentive to monitor, monitoring failures stem from the economic nature of the government-private firm relationship, which is characterized by the problem of "hidden delivery," a type of market failure in which "the purchaser of a good is unable to observe its consumption." James Gentry, *The Panopticon Revisited: The Problem Of Monitoring Private Prisons,* 96 Yale L.J. 353, 356 (1986). In such a case, the buyer cannot accurately gauge the quality of the product delivered; the seller, who knows this, has an incentive to deliver less value and pocket the difference. *Id.*

While governments contracting with private prisons

assure the public that they will monitor the facilities closely, practice demonstrates that these monitoring systems often fail dramatically.[20] The absence of meaningful oversight was transparent in Brazoria County, Texas, where the on-site sheriff tasked with monitoring the private facility recommended that the facility hire guards known to have criminal convictions for abusing inmates; participated in covering up the abuses; and repeatedly stated that he had no responsibility for setting standards or making policy for the private prison. *Kesler v. King*, 29 F. Supp.2d at 362-365.

More typically, contracting governments abdicate their monitoring role, and private prisons thwart active monitoring by hiding information and refusing to cooperate with the governmental body. For example, after the riots at the CSC/Esmor facility in New Jersey prompted an investigation of the conditions at that facility, the INS concluded:

> Oversight of the Esmor operation by the Newark [INS] district was minimally effective. Communication between the INS and Esmor was insufficient.... Esmor was able to distance itself from oversight by the INS and conceal information concerning its operations. . . . Esmor demonstrated a pattern of initiating changes in policy without prior notification to the INS... materially hinder[ing] INS' ability to effectively perform its oversight functions.

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[20]Indeed, they fail predictably: typically, government officials embrace privatization to reduce costs. In selling the idea of cost-savings to the public, they seek to reduce costs as much as possible, and do not always budget adequately for the cost of monitoring the private prison in calculating the contract price. When they do, they may discover that the combined costs of the contract and monitoring exceed the costs to the government in running the prison system itself. Gentry, *supra*, at 359.

INS Interim Report, *supra*, at 3, 9. Similar problems occurred at Youngstown, where the District of Columbia conducted virtually no on-site monitoring, notwithstanding persistent reports of security problems, until ordered to do so by a federal court; and CCA repeatedly refused to cooperate with investigatory bodies. Youngstown Report, *supra*, at 7, 55.

In addition, government incurs significant costs in changing contractors. *See* Note, *Qualified Immunity--Privatized Governmental Functions*, 111 Harv. L. Rev. 390, 397 (1997) (noting significant startup costs, lack of competition, and high costs of resuming a contract with a new contractor). Governments must undertake the often lengthy process of soliciting and evaluating bids and negotiating new contracts; entire prison populations may need to be moved from one facility to another, raising significant security problems; a new staff must be trained in the new jurisdiction's procedures; and governments suffer from a significant loss of continuity in the relationship with the private company. Firms recognize these transaction costs and the tremendous advantage of securing an initial contract, and thus have an incentive to artificially lower bids on initial contracts with jurisdictions simply to get a foot in the door. *See* Gentry, *supra*, at 358 (recognizing economic value of entrenchment). Faced with these costs, a rational government could well conclude that the costs of obtaining a new contractor exceed the costs of maintaining a relationship with an old contractor, even in the face of increased costs due to liability for unconstitutional conditions.

Finally, the market-restraint argument does not account for the prospect that, at the end of the day, it may make economic sense for a prison to egregiously violate inmates' rights if the cost savings thereby generated still exceed the costs of liability. This is more likely to occur if the prison firm is not

required to internalize the costs of its wrongdoing through liability rules. Given the significant impediments to prisoners' recovery of damages for constitutional or common law torts — such as their indigent status, inability to retain qualified counsel, fear of retaliation from prison staff, as well as statutory impediments to prison litigation[21] — the aggregate damages may still be lower than the cost savings a prison could obtain by hiring incompetent staff, overcrowding, refusing to meet basic nutritional and medical needs, cutting programming, and refusing to maintain the facility. To protect the *individual*'s rights to constitutional treatment while in prison, a more effective deterrent than the market is necessary. Unless the private prison firms are held accountable for the damages from constitutional violations from which they benefit, they will have little reason to comply with the Constitution if they can benefit economically from ignoring it.

CONCLUSION

The decision of the court of appeals should be affirmed.

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[21]Under the Prison Litigation Reform Act, prisoners may no longer recover for mental or emotional injury without a showing of physical injury. 42 U.S.C. § 1997e(e). The PLRA also requires prisoners to exhaust administrative remedies (42 U.S.C. § 1997e(a)), even when they are damage claimants and the prison grievance system does not provide for damages; prisoners who fail to grasp this rule will have their cases dismissed. *Booth v. Churner*, 121 S.Ct. 1819 (2001). Attorneys' fees for prisoners who prevail on their claims have been drastically reduced. 42 U.S.C. § 1997e(d); *see Martin v. Hadix*, 119 S.Ct. 1998 (1999). Prisoners seeking to proceed *in forma pauperis*, unlike other IFP litigants, are now required to pay the filing fee in installments, which may constitute a significant deterrent to filing meritorious as well as other cases. 28 U.S.C. § 1915(a)-(c). Some prisoners are now barred from using the *in forma pauperis* provisions entirely. 28 U.S.C. § 1915(g).

Respectfully submitted,

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